IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75 740

JAMES S. GRAHAM,
Appellant,

vs.

MARCH FONG EU, Secretary of State,
and REPUBLICAN STATE CENTRAL COMMITTEE
OF CALIFORNIA,
Appellees.

On Appeal from the United States District Court for the Northern District of California

JURISDICTIONAL STATEMENT
and
MOTION FOR EXPEDITED HEARING

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the District Court has been certified for publication but has not yet been reported. It is set forth herein as Appendix A to this jurisdictional statement.

JURISDICTION

The opinion of the three-judge District Court was filed on July 28, 1975. The judgment in the case was filed September 9, 1975. It is set forth herein as Appendix B. Appellant filed his Notice of Appeal on September 26, 1975. This is shown in Appendix C. Jurisdiction to review the judgment of the three-judge District Court is conferred on this Court by 28 U.S.C. §§ 1253 and 2101(b). See *Dunn v. Blumstein,* 405 U.S. 330, 332-333 (1972).

QUESTIONS PRESENTED

1. Whether the use in California of the winner-take-all method of selecting delegates to the Republican National Convention, which is a method used in only three other jurisdictions, "operates to dilute or cancel the voting strength of . . . political elements" in violation of *Whitcomb v. Chavis,* 403 U.S. 124, 144 (1971).

2. Whether the District Court below could disregard express language in *Cousins v. Wigoda* 419 U.S. 477, 489-490 (1975), indicating that the relevant constituency for national convention delegate selection is the nation rather than the state.

3. Whether the winner-take-all primary violates constitutional constraints by operating "systematically to prevent ultimate effective majority rule." *Lucas v. Colorado General Assembly,* 377 U.S. 713, 754 (1964) (Stewart, J., dissenting).

PROCEEDINGS BELOW

On March 1, 1974 Appellant filed his Complaint in the U. S. District Court for the Northern District of California seeking a declaratory judgment regarding the constitutional validity of Cal. Elec. Code § 6201 and a permanent prohibitory injunction preventing future enforcement of that provision. It is under this statute that delegates from California to the Republican National Convention are elected as a slate committed to the candidacy of the plurality winner of the statewide primary. This is more popularly known as the winner-take-all primary. On April 8, 1974 a three-judge District Court was ordered convened to hear the case. On September 18, 1974 a Motion to Strike the Complaint filed by Defendants was denied. On January 17, 1975 a Motion to Strike Objections to Requests for Admissions filed by Appellant was granted in part and denied in part. Subsequently the Defendants admitted that no American state chooses its state legislatures on a statewide winner-take-all basis at the present time and that all members of the United States House of Representatives are chosen from single-member districts at the present time. At the same time, however, the Defendants stood by their other responses that they were unable to admit or deny certain requests related to the impact of the unit rule on political stability, voters and candidates on the ground that they lacked sufficient information or knowledge to respond and that such information could not be obtained with reasonable inquiry.

On February 26, 1975 a hearing on the merits of the case was held. At the time of the hearing Appel-

lant submitted his own affidavit establishing his standing to sue, an affidavit of Congressman Paul N. McCloskey, Jr. regarding the effect of the winner-take-all rule on presidential candidates, and an affidavit by Dr. Daniel A. Mazmanian of Pomona College and the Brookings Institution regarding the historical origins of the winner-take-all primary and its impact upon voters, candidates and political stability. The Defendants submitted an affidavit by a party official and certified copies of the primary election returns from 1912 to 1972.

On July 28, 1975 the District Court filed its opinion upholding the winner-take-all primary.

THE QUESTIONS RAISED BY THIS APPEAL ARE SUBSTANTIAL

I. THE BUILT-IN BIAS OF THE WINNER-TAKE-ALL PRIMARY BOTH DILUTES AND CANCELS THE VOTING STRENGTH OF DISCERNIBLE VOTING ELEMENTS; THE DISTRICT COURT ERRED IN FINDING THE ELECTION OF DELEGATES STATEWIDE CONSTITUTED A PERMISSIBLE MULTI-MEMBER DISTRICT.

The central abuse of the winner-take-all primary is the failure of the State to allocate its delegates to districts for their election. It is well established that the "achieving of fair and effective representation is concededly the basic aim of legislative apportionment." *Reynolds v. Sims,* 377 U.S. 533, 565-66 (1964). Quite implicit as a corollary to this principle is the concept that some form of districting is necessary in order to obtain fair and effective representation. This proposition was recently indicated in *Gaffney v. Cummings,* 412 U.S. 735, 753 (1973): "The very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats."

In the District Court the Appellant argued that the election of delegates at large was unconstitutional since it "operate[s] to dilute or cancel the voting strength of . . . political elements" in violation of *Whitcomb v. Chavis,* 403 U.S. 124, 144 (1971). In rejecting this claim the District Court concluded that insufficient proof of cancellation was offered. In so ruling the District Court departed substantially and erroneously from the controlling principles set forth in *Whitcomb.*

Most assuredly the three basic criteria necessary to a showing of invalidity were established, to wit, that (1) "the district is large and elects a substantial proportion of the seats in either house," (2) that "it is multi-member for both houses of the legislature," and (3) that "it lacks provision for at-large candidates running from particular geographical sub-districts." *Id. at* 143-144. *Chapman v. Meier,* 420 U.S. 1, 17 (1975); *Burns v. Richardson,* 384 U.S. 73, 88 (1966). The district in question herein constitutes the largest demographic and geographic multi-member district in the United States. It is substantially larger than the district involved in *Whitcomb* where eight senators and fifteen assemblymen from a single county were involved. *Id. at* 127-28. Here the Court is con-

cerned with the election of 167 delegates to the 1976 Republican National Convention selected from an entire State. Moreover, no provision requires delegates to reside in sub-districts nor is there an additional forum where the unit rule does not apply.

Beyond these basic considerations, however, Appellant carried his burden in every other critical respect. In *Whitcomb* this Court considered important the inability of the challengers to show (1) "that the party failed to slate candidates satisfactory to the ghetto," (2) that the complainants were not "equally represented on those occasions when legislative candidates were chosen," (3) that "any legislative skirmish affecting the State . . . or Marion County in particular would have come out different [had the] County been subdistricted," (4) that the representation "in particular legislative situations would . . . have been any different if the [representatives] had been chosen from single-member districts," (5) that there was "recurring poor performance by Marion County's delegation with respect to the [complainants]." *Id. at* 152, 149, 148 and 155. In contrast, Appellant herein demonstrated each of these elements. Since delegates for the candidate winning the primary are committed by Cal. Elec. Code §6057(g) to vote indefinitely for the winning candidate, the voters for non-plurality candidates secure no representation whatever at the critical nomination stage of the intraparty process. Furthermore, Appellant demonstrated that had delegates been elected from districts the outcome would have been different. It was shown that in the Republican Primary of 1964 Governor Rockefeller was the winner in forty-four (44) of the fifty-eight (58) counties in California, including virtually all of Northern California. Yet because of substantial victories in Los Angeles and Orange Counties Senator Goldwater managed to narrowly carry the whole state and thus the entire delegation. In further illustration, evidence was entered regarding the Democratic Primary of 1972 where Senator McGovern received 1,550,652 votes or 43.50% of the total, thereby leaving a majority of 56.50% of the voters unrepresented at the Convention. That evidence further indicated that had delegates been elected from districts Senator Humphrey would have gained substantial representation since he captured the plurality vote in Los Angeles and Orange Counties as well as six (6) other counties.

Indeed, not only would the outcome of the delegate elections in California have been different, the outcome of the respective party nominations might well have been different. It cannot be gainsaid that the California Primary victories of Senators Goldwater and McGovern were key to their nominations. *See* T. H. White, *The Making of the President 1972* 122 (1973).

In *Whitcomb* the Court concluded that the challengers had established their case only "mathematically" and that their claims of discrimination "remains a theoretical one." *Whitcomb v. Chavis, supra, at* 144-145 fn. 23. There was a further finding that the complainants "could fairly be said to be repre-

sented by the entire delegation" and that the minorities within the County had at least a "claim to the partial allegiance of [those] representatives." *Id. at* 153-54. Moreover, that "the interest[s] of ghetto residents in certain issues did not measurably differ from that of other voters" and that in certain "respects [the] assemblymen were satisfactorily representative of the ghetto." *Id. at* 155. In contrast, as indicated already, there was no evidence below to even remotely support such conclusions.

It is respectfully submitted that, notwithstanding contrary dicta, the considerations set forth above were essential to the disposition in *Whitcomb. See Id. at* 170 (Harlan, J., dissenting). Indeed, many of those factors were restated in the subsequent case of *White v. Regester,* 412 U.S. 755 (1973). There for the first time a multi-member district was invalidated on the ground of dilution of minority votes. In so ruling the Court found that the controlling political organization did not "exhibit good faith concern for the political . . . needs . . . of the Negro community . . . [and that] the black community ha[d] been effectively excluded from participation in the . . . primary . . . and was . . . generally not permitted to enter into the political process in a reliable and meaningful manner." *Id. at* 767. In short, the representation was "insufficiently responsive to [minority] interests." *Id. at* 769. More recently, these concerns were voiced in *Chapman v. Meier,* 420 U.S. 1, 16 (1975), where the Court indicated that sufficient evidence of dilution would be shown where there is "bloc voting by dele-

gates from a multi-member district . . . result[ing] in undue representation of residents of those districts relative to voters in single-member districts." Although differently phrased, these tests reaffirm the controlling principles set forth in *Whitcomb,* which were totally overlooked by the District Court. In summary, merely allowing voters to participate by casting a ballot is insufficient. More is required, specifically, extending non-plurality factions at least the *possibility* of obtaining delegate representation.

In *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973) (en banc), cert. granted sub. nom. *East Carroll Parish School Board v. Marshall,* 95 S.Ct. 2677 (1975), another indicia of voter dilution in multi-member district cases was identified. The Court of Appeals indicated that where the challenged district exists as a part of a legitimate articulated state policy favoring multi-member districts, the proof of dilution will be made more difficult. *Id. at* 1305. In California, however, the statutory and Constitutional policy *requires* single member districts for the election of all state senators, assemblymen and federal congressmen. Cal. Const. Art. IV, § 6; Cal. Elec. Code §§ 30000, 30100 and 30201 (West Supp. 1975). Similarly, the rules of the Republican Party nowhere expressly sanction the election of delegates by a statewide slate with the winner taking all. Although party rules expressly authorize the selection of delegates at large, there is no provision that expressly approves such selection on a slate basis. It is the slate basis, of course, which prohibits the voter from splitting his

vote among different factions and constitutes the essential built-in bias of the rule. It is equally true, however, that no party rule expressly prohibits winner-take-all. Nevertheless, under this further test the winner-take-all primary must be viewed with further doubt.

In the District Court Defendants observed that heretofore multi-member districts have been invalidated only where racial rather than political elements have been adversely affected. It is respectfully submitted, however, that the harms involved herein are of the very same type as those visited upon the complainants in *White v. Regester* and that to countenance such harms would in fact constitute a form of reverse discrimination. Furthermore, that the absence of racial factors in this case is more than set off by (1) the overwhelming geographic and demographic factors and (2) by the fact that the unit rule more completely distorts the popular will than was the case in *Whitcomb*. In *Whitcomb* the districting factor had impact only at the final stage of the primary and in the final election. Thus all voting elements had an equal voice at the actual stage of party nomination. Yet this is precisely what the unit rule prevents herein.

In general this Court has "underscored the danger of apportionment structures that contain built-in bias tending to favor particular . . . political interests." *Abate v. Mundt*, 403 U.S. 182, 185-186 (1971). With particular reference to multi-member districts this Court has indicated that such built-in bias will be

shown where there is "bloc voting [that] *diminishes* the opportunity of a *minority* party to win seats." *Burns v. Richardson,* 384 U.S. 73, 88 fn. 14 (1966) (emphasis added). In California, however, the bias is substantially greater for here the unit rule *compels* bloc voting and can *prevent* even a *majority* from winning seats. This is the major distinction between this case and *Whitcomb*. In the latter the failure of minorities to gain seats was only the coincidental result of the pre-existing voting patterns within the district. For split ticket voting could have resulted in minority party victories. As such, the inability of minorities to gain representation was more "a function of losing elections than of built-in bias." *Id. at* 153. In contrast, in the California primary the failure of non-plurality factions to gain representation results exclusively from the built-in bias of the unit rule which prohibits split ticket voting and which can operate "systematically to prevent ultimate effective majority rule." *Lucas v. Colorado General Assembly,* 377 U.S. 713, 754 (1964) (Stewart, J., dissenting).

II. THE ELECTION OF DELEGATES FROM CALIFORNIA IS A PART OF A NATIONAL PROCESS WITHIN WHICH THE RIGHT TO AN EFFECTIVE VOTE MUST BE PROTECTED AT ALL LEVELS.

It is precisely because the distortion of voter preferences which takes place under the unit rule occurs at the first tier of the delegate selection process that judicial intervention becomes imperative. For the

distortions that can take place at this level can result in what has been acknowledged to be unacceptable: the "frustration of the majority will through minority veto." *Reynolds v. Sims,* 377 U.S. 533, 576 (1964). The dangers that inhere were most cogently articulated by the late Professor Alexander Bickel, *Reform & Continuity* 54 (1971):

> No doubt majority rule must obtain at final decision-making stages in our politics. But that very principle itself can be perverted by a too early insistence on it at preliminary decision-making stages. If at such preliminary stages in the delegate selection process successive minorities are allowed to prevail and to represent only themselves . . . then it is quite possible, it is in some circumstances likely, that the final majority of delegates which prevails at the convention will represent a minority, and not a majority, of the party voters in the country at large.

In response to this argument, the Defendants in the District Court argued that the California Primary is not a preliminary election but rather the final election phase for convention delegates. As such, they argued that the relevant constituency for the selection of delegates is the State. Further, since the State is the appropriate constituency then a winner-take-all principle may apply since the primary is both the first and final phase of the delegate selection process.

This reasoning should be totally rejected. It is entirely specious to conclude that delegate selection is a process ending at the State line. This was inferentially indicated in *Oregon v. Mitchell,* 400 U.S. 112,

134 (Opinion of Black, J.), 148 (Opinion of Douglas, J.) (1970). It was then clearly indicated in *Cousins v. Wigoda,* 419 U.S. 477, 489-90 (1975) (emphasis added):

> Delegates perform a task of supreme importance to every citizen of the Nation regardless of their state of residence. The vital business of the Convention is the nomination of the Party's candidates for the offices of President and Vice President of the United States. To that end the state political parties are "affiliated with a national party through acceptance of the national call to send state delegates to the national convention." *Ray v. Blair,* 343 U.S. 214, 225 (1952). *The States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice Presidential candidates . . . a process which usually involves coalitions cutting across state lines. The Convention serves the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State.*

In the selection of presidential electors the Constitution in Article II fragments the selection of electors and *necessarily* defines the state as the appropriate geographic constituency. But in the delegate selection phase this does not *necessarily* follow. In this area the constituency can quite permissibly go beyond the boundaries of the state as, for example, through the use of regional primaries. *See Cousins v. Wigoda,* 419 U.S. 477, 490 fn. 9 (1975). This results from the fact that in delegate selection the state is allowed to act by the *national* political party with respect to the seat-

ing of delegates at its *national* convention for the selection of a presidential candidate whose constituency, if elected, is the *nation*. Thus while the District Court properly concluded, in footnote 32, that in the electoral college interstate distortions are an inevitable consequence of the constitutional decision to fragment the election process among the several states, it erred in failing to perceive that this is not an inevitable result in the nomination phases. Accordingly, because the state has been given a choice with respect to delegates, since substantial infringements on fundamental rights are involved "the State may not choose the way of greater interference." *Dunn v. Blumstein,* 405 U.S. 330, 343 (1972).

This analysis is strongly supported by the closely analogous case of *Gray v. Sanders,* 372 U.S. 368 (1963), which was dismissed by a footnote in the District Court. At issue there was the Georgia County unit system of counting votes in a statewide primary for governor and senator. Under that system candidates who received the highest number of votes in a county were granted the entire unit vote of that county. In the District Court the system was found defective only for the reason that unit votes were not allocated among the counties strictly according to population. On review, however, this Court held that the entire system, even if properly apportioned, would remain defective since it would still result in votes being "counted only for the purpose of being discarded." *Id. at* 381 fn. 12. Thus *Gray* was not an equal population case; rather the case primarily confronted

the issue of the qualitative aspects of intraparty representation.

In essence, *Gray* held that equal protection prohibits the use of vote cancellation devices at the *starting line* of the intraparty process. What *Gray* condemned was the discarding of votes at a "preliminary election that in fact determines the true weight a vote will have." *Id. at* 380. In so doing the Court reaffirmed that the "concept of political equality . . . extends to all phases of state elections." *Id. See Terry v. Adams,* 345 U.S. 461, 469-470 (1953). As such, the decision is more relevant than the holdings in *Whitcomb v. Chavis* and *Williams v. Virginia State Board of Elections* which both concerned dilution at the *final* stage of the electoral process.

Although the relevant constituency in *Gray* was the state, the principle would appear to have similar application here where the convention serves a "pervasive national interest" and acts on behalf of a constituency that "comprises to a certain degree the entire electorate." *Cousins v. Wigoda, supra,* at 490; *Bode v. National Democratic Party,* 452 F.2d 1302, 1306 (D.C. Cir. 1971). As such, since the unit rule in this action similarly operates as a built-in bias that awards representation to only one faction while automatically cancelling the votes of other factions within the constituency, it too must violate constitutional constraints. "[W]ithin a given constituency there can be room but for a single constitutional rule—one voter, one vote." *Gray v. Sanders, supra* at 382 (Stewart, J., concurring).

III. USE OF THE UNIT RULE IN THE ELECTORAL COLLEGE RESULTS FROM SPECIAL CONSTITUTIONAL PROVISIONS THAT DO NOT APPLY HEREIN; ANALOGIES BETWEEN THE ELECTORAL COLLEGE AND DELEGATE SELECTION ARE TOTALLY INAPPOSITE.

In upholding the validity of the California primary, the District Court relied heavily on the case of *Williams v. Virginia State Board of Elections,* 393 U.S. 320 (1969), *aff'g* 288 F.Supp. 622 (E.D. Va. 1968). In that case use of the winner-take-all rule in the Electoral College was summarily affirmed. Such reliance, however, was critically erroneous since the outcome in *Williams* was mandated by specific constitutional provisions that have no application whatever in the context of delegate selection.

In *Williams* the District Court concluded that the specific provisions of Article II, Section 1 constituted special authority for the unit rule. *Id. at* 626. Indeed, long ago it was held that the Article II power "leaves it to the legislatures *exclusively* to define the method" of selecting electors. *McPherson v. Blacker,* 146 U.S. 1, 27 (1892). More recently the Court stated that there "can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors." *Williams v. Rhodes,* 393 U.S. 23, 29 (1968).

Further support for the unit rule in the Electoral College was found under the Twelfth Amendment which provides that where no candidate receives a majority of the electoral vote, then the selection is to be made in the House of Representatives with each state delegation voting as a unit with one vote as

according to how the greatest number of representatives voted. The District Court in *Williams* inferred that if a unit rule was proper within the House of Representatives, a unit rule within the Electoral College was permissible. *Id. at* 626-27. Further reliance was placed on historical evidence suggesting that use of the unit rule in the Electoral College was anticipated by the draftsmen of Article II. *Id. at* 626 and 628.

By deriving support from the *Williams* decision, however, the District Court below erred in two significant respects. First, it failed to perceive that where a state acts under an express plenary grant of power from the Constitution, there is an "added presumption in favor of the validity of the state regulation." *California v. LaRue,* 409 U.S. 109, 118 (1972). Thus state action which might be invalid where the state acts from its general authority may be constitutional where enacted under an express constitutional authority. Or, stated differently, where the Constitution expressly enlarges the power of a state, the scope of judicial review is correspondingly reduced. With respect to the Article II power this position was articulated by Justices Stewart and White in *Williams v. Rhodes,* 393 U.S. 23, 50-51 (Stewart, J., dissenting), 61 (White, J., dissenting). Indeed, the doctrine may have gained subsequent acceptance from a majority of the Court in *Moore v. Ogilvie,* 394 U.S. 814 (1969). There a statute legislated under the Article II power was struck down without mention of strict review on a finding that it applied "a rigid, arbitrary formula." *Id. at* 818.

The second error of the District Court below was in holding that analogies could be drawn in any event between delegate selection and the Electoral College. In *Davis v. Mann,* 377 U.S. 678, 692 (1964), analogies between the College and state legislatures were rejected. In *Gray v. Sanders,* 372 U.S. 368, 377-78 (1963), a similar result was reached with respect to the election of statewide officers:

> [T]he Electoral College was set up as a compromise to enable the formation of the Union among the several sovereign states . . . we think the analogies to the Electoral College to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the Electoral College in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a state in a statewide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued.

Moreover, the District Court below erred in ignoring historical materials showing that neither the draftsmen of Article II in 1787 nor the authors of the Twelfth Amendment in 1804 could have intended use of the unit rule with respect to presidential nominating conventions since the system of party nominations did not develop until some two decades later. *See* S. E. Morison, *The Oxford History of the American People* 309 (1965); R. Nichols, *The Invention of*

the American Political Parties 294 (1967). Additionally, there was further uncontested evidence to this effect that was admitted into the trial record. Affidavit of Dr. Daniel A. Mazmanian, pages 3-4. *See also Wigoda v. Cousins,* 342 F.Supp. 82, 86 (N.D. Ill. 1972). In light of all of the foregoing, the reliance of the District Court on analogies between delegate selection and the Electoral College and what is constitutionally permissible in the latter context would appear clearly erroneous.

IV. THE DISTRICT COURT ERRED IN FAILING TO APPLY STRICT SCRUTINY; YET EVEN UNDER MINIMAL REVIEW THE STATUTE AT ISSUE MUST FAIL.

It is clear from Footnote 30 that the District Court below did not test the winner-take-all rule by a standard of strict review. This result was apparently reached by reasoning that the case did not present claims of geographic discrimination or of discrimination against identifiable political groups. Both conclusions were incorrect.

First, the geographic discrimination which occurs under the unit rule arises in both an intrastate and interstate sense. Within California the failure of the state to district results in discernible geographic units being totally deprived of the representation they would otherwise receive by districting. It further arises vis a vis Republicans in other states who under party rules and statutes are permitted to select delegates through systems that avoid the structural defects of the unit rule.

Second, the District Court erred in concluding that discrimination against an identifiable political group was necessary to the application of strict review. This proposition was rejected in *Bullock v. Carter,* 405 U.S. 134 (1972). There this Court observed that while the filing fee requirement could not be described "by reference to discrete and precisely defined segments of the community as is typical of inequalities challenged under the equal protection clause . . . we would ignore reality were we not to recognize that this system falls with unequal weight on voters as well as candidates." *Id. at* 144. Similarly, the presence of discrimination against a specific political group was not considered necessary to the application of strict review in such cases as *Hill v. Stone,* 421 U.S. 289 (1975); *Kusper v. Pontikes,* 414 U.S. 51 (1973); and *Storer v. Brown,* 415 U.S. 724 (1974).

However, assuming *arguendo* that minimal review was proper, still the District Court erred in holding the interests identified survived such analysis. This follows since it was forced to employ the fictional approach in identifying the state interests and since the purposes asserted were not legitimate.

In several recent cases principled constitutional adjudication has been found to reject "a highly fictional approach to statutory purpose." *Brown v. Merlo,* 8 Cal. 3d 855, 865 n. 7 (1973). Thus in instances judicial review has been limited to analyzing only those purposes that have been expressly articulated. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 17 (1973); *McGinnis v. Royster,* 410 U.S. 263, 270

(1973). *See* Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court,* 86 Harv. L. Rev. 1, 21 (1972). In order to derive the purposes of legislative action, four sources are to be reviewed: the preamble to the statute, the legislative history and the pronouncements of elected state officials or state courts. *Id. at* 46-47. As judged by these sources, however, the reasons for the unit rule do not appear.

Thus the District Court was forced to resort to the more fictional approach. In part, it held that the unit rule was a legitimate instrument in the narrowing processes that *must* take place prior to nomination. However, the validity of a state interest in compelling such a narrowing prior to nomination must be seriously doubted. For previously this Court has held only that "intraparty competition be settled before the general election by primary election or party convention." *American Party of Texas v. White,* 415 U.S. 767, 781 (1974). No case has yet sanctioned a state interest in narrowing the field of candidates at earlier levels and surely this should not be allowed herein where such an extreme narrowing is accomplished without express party sanction and with the effect of denying the "fluidity and overlap of philosophy . . . [of] political parties in this country." *Rosario v. Rockefeller,* 410 U.S. 752, 769 (1973) (Powell, J., dissenting).

The District Court further concluded that the unit rule was justified by the interest in building a winning consensus in support of the best candidate. Yet recent

history would cast substantial doubt about the validity of this interest, in light of its consequences. For example, although Senator Goldwater in 1964 and Senator McGovern in 1972 were able to achieve winning margins in the California primary, these victories were hardly able to sustain them in the general elections that followed where they suffered crushing defeats. Indeed, not only were they rejected by the general electorate, their nominations further caused deep divisions within their parties and wholesale defections from the ranks. Factional hostilities within the party were increased and coalition formation was defeated. Thus, rather than building a winning consensus as the District Court found, winner-take-all enabled distinctly minority candidates to achieve nomination at the very expense of that goal.

V. THE WINNER-TAKE-ALL PRIMARY MUST BE JUDGED UNDER A STRICT STANDARD OF JUDICIAL REVIEW

It cannot be gainsaid that in numerous instances this Court has reviewed infringements on voting and associational rights under a strict standard of review. *Hill v. Stone,* 421 U.S. 289, 298 (1975); *American Party of Texas v. White,* 415 U.S. 767, 780 (1974); *Storer v. Brown,* 415 U.S. 724, 736 (1974); *Kusper v. Pontikes,* 414 U.S. 51, 58-60 (1973); *Dunn v. Blumstein,* 405 U.S. 330, 336-37 (1972); *Bullock v. Carter,* 405 U.S. 134, 144 (1972); *Abate v. Mundt,* 403 U.S. 182, 185 (1971); *City of Phoenix v. Kolodziejski,* 399 U.S. 204, 205 (1970); *Cipriano v. City of Houma,* 395

U.S. 701, 704 (1969); *Kramer v. Union Free School District,* 395 U.S. 621, 626-27 (1969); *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 670 (1966); *Reynolds v. Sims,* 377 U.S. 533, 561-562 (1964). Where the strict standard applies, the inquiry becomes "whether [the statute is] necessary to further compelling state interests." *American Party of Texas v. White, supra,* at 780. It is true, of course, that the strict standard is not to be applied in every case. Its application is dependent upon an initial finding that the statute has "a real and appreciable impact on the exercise of the franchise" or that it thrusts " a significant encroachment upon associational freedom." *Bullock v. Carter, supra,* at 144; *Kusper v. Pontikes, supra,* at 58. Although variously phrased, this standard would appear to have the acceptance of all members of this Court. *See Hill v. Stone,* 421 U.S. 289, 304-305 (Rehnquist, J., dissenting). It is respectfully submitted that, following this standard, the California Primary must be strictly reviewed.

The decisions of this Court in the voting area, which have proceeded in two lines of development, would strongly substantiate this argument. Under the first line, whenever a decision of general interest is committed to the electoral process, resident citizens within the constituency may not be denied the right to participate in that election. Thus there is a prohibition against "fencing out from the franchise a sector of the population because of the way they may vote." *Carrington v. Rash,* 380 U.S. 89, 94 (1965). Yet this is precisely what winner-take-all accomplishes, that is,

an absolute exclusion of voters for non-plurality candidates from the national convention—where actual nomination is made—simply because of the way they vote.

The other part of the one person-one vote principle is that "statutes which may *dilute* the effectiveness of some citizens' votes receive close scrutiny" since each voter is entitled to "fair and effective representation." *Kramer v. Union Free School District, supra,* at 626; *Gaffney v. Cummings,* 412 U.S. 735, 748 (1973). Underlying this has been the assumption that "every citizen has an inalienable right to full and effective participation in the political processes." *Reynolds v. Sims,* 377 U.S. 533, 565 (1964). It is submitted that under all of these standards the unit rule must be considered unconstitutional.

The substantiality of the burdens imposed by the unit rule on the voting rights extended by the party and the state cannot be considered, of course, without weighing their concomitant impact on the right "to associate effectively with the party of . . . choice." *Kusper v. Pontikes,* 414 U.S. 51, 58 (1973). This discrimination exists in a dual sense.

First, the rule operates to prohibit supporters of non-plurality candidates from associating at the national convention and from exercising any political power therein simply because they cannot win a plurality vote. Thus the unit rule, like the statute condemned in *Williams v. Rhodes,* 393 U.S. 23 (1968), operates to keep "all parties off the ballot [at the

convention] until they have enough [votes] to win." *Id. at* 32. Further, the statute overcomes the "right to have one's voice heard and one's view considered by the appropriate . . . authority . . . No matter what the institution to which the decision is entrusted, political groups have a right to be heard before it." *Id. at* 41-42 (Harlan, J., concurring).

Second, not only may a majority be unable to join other party members at the convention, but they also "have their votes joined with those of their opponents to count against their own candidate at the national level. Since allocation formulas assign delegates to national conventions according to the total population and party vote within a state, a state receives delegate strength for all party factions—but that strength works to the disadvantage of all factions other than the one supporting the plurality winner. Delegates allocated to reflect the strength of non-plurality winners actually are awarded to an opponent. The winner-take-all primary is therefore doubly discriminatory —its rigid structure bars all factions, except supporters of the primary winner, from the national conventions and awards delegates allocated to represent all the factions to a single faction." James F. Blumstein, *Party Reform, The Winner-Take-All Primary and the California Delegate Challenge,* 25 Vand. L. Rev. 975, 998-999 (1972). In essence, the effect of the unit rule is to stifle the "[c]ompetition in ideas and governmenntal policies [which] is at the core of the First Amendment freedoms." *Williams v. Rhodes, supra, at* 32.

VI. THE WINNER-TAKE-ALL PRIMARY CONSTITUTES A SUBSTANTIAL INFRINGEMENT UPON CONSTITUTIONALLY PROTECTED RIGHTS.

In determining the substantiality of an infringement on voting and associational freedoms three factors becomes crucial: "[t]he facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Williams v. Rhodes, supra,* at 30. *See Dunn v. Blumstein,* 405 U.S. 330, 335 (1972). Upon reviewing these considerations, the heavy burdens imposed by the unit rule become undeniably apparent.

A. The Unit Rule Is Unique and Without Parallel In Other Representative Institutions.

A decision striking down the California Primary would be *sui generis* in many respects. No other state has a system of nomination whose consequences equal or exceed the severity of those that occur here. Indeed, from this fact alone a conclusion that the statute imposes a "facially burdensome requirement" would be proper. *Rosario v. Rockefeller,* 410 U.S. 752, 764 (1973) (Powell, J., dissenting). Although three other jurisdictions employ the rule—Oregon, Rhode Island and the District of Columbia—its use in those jurisdictions has significantly different consequences from those that follow in California. In those states the geographical size, population and political diversity which characterize California are lacking. As such, use of the rule therein may be supported by special considerations which do not arise in California. It should be observed, moreover, that mandatory use of

the rule has recently been abandoned by the California Democratic Party and South Dakota.

The uniqueness of a statewide winner-take-all rule compared with other institutions is equally undeniable. Below the Defendants admitted that no state chooses its legislators on a statewide winner-take-all basis and that Congress elects all its members from single member districts. Thus within other contexts the parallel use of the rule does not arise. Quite simply, the winner-take-all rule is a unique anomaly although undoubtedly the District Court opinion could serve as authority for extending the use of the rule to state legislatures or Congress.

B. Non-Judicial Forums Do Not Provide Possibility of Relief.

In other contexts this Court has held that the availability of other forums for relief, such as a properly apportioned legislature, is irrelevant. *Avery v. Midland County,* 390 U.S. 474, 481-82 fn. 6 (1968); *Kramer v. Union Free School District,* 395 U.S. 621, 628 (1969). Even assuming that this was not the case, however, the argument would be without practical significance herein. For historically the unit rule has placed California and its favorite son candidates in positions of power at the convention that they would not have otherwise obtained. Specifically, Governors Warren and Reagan have won the primary a total of four times. Thus resistance to change has been kept strong within this state.

Conceivably, of course, relief could come from the national party rather than the legislature. However,

this is not likely for two reasons. First, historically either the favorite son winner has cast his delegation to the party nominee or the primary winner has actually been the nominee. *See* Richard C. Bain and Judith H. Parris, *Convention Decisions and Voting Records,* Appendix C (2nd Edition 1973). Thus the dominant convention alliances have traditionally favored the unit rule. Second, voters for losing candidates in the primary are not represented at the convention while, concurrently, the winner-take-all delegation is present to oppose change. The operation of these factors together has tended "seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Products,* 304 U.S. 144, 153 fn. 4 (1938). Of course, where this occurs this is further ground to invoke "a correspondingly more searching judicial inquiry." *Id.*

C. Striking Down Winner-Take-All Would Advance Several Important Interests; The Existence of Less Restrictive Alternatives Further Supports Such Action.

By invalidating the California Primary several important individual and state interests would be advanced. For virtually any other selection system conceived might "prevent domination of an entire slate by a narrow majority . . . ease direct communication with [the representative] . . . reduce campaign costs, and . . . avoid bloc voting." *Chapman v. Meier,* 420 U.S. 1, 20 (1975). It would also avoid the complaint by voters who "feel that they have no representative specially responsible to them." *Id. at* 16.

Additionally, the state could devise a system that would protect "the substantial state interest in attempting to ensure that the election winner . . . represent a majority of the community." *Storer v. Brown,* 415 U.S. 724, 729 (1974); *Williams v. Rhodes,* 393 U.S. 23, 32 (1968). Lastly, at the very least the selection of delegates on any other basis would at least permit the *opportunity* of delegate selection actually reflecting, in a rough way, the preferences of the voters. The substantiality of this interest cannot be denied. This was so held in *Gaffney v. Cummings,* 412 U.S. 735 (1973), where an apportionment plan that was drawn with the intent of approximating the statewide strength of the political parties was both approved and commended. *Id. at* 752-54.

On the other hand, whatever state interests are supposed to be forwarded by the unit rule, it cannot be denied that they could "be protected by less severe means" that do not "broadly stifle the exercise of fundamental personal liberties." *Rosario v. Rockefeller,* 410 U.S. 752, 770 (1973) (Powell, J., dissenting); *Kusper v. Pontikes,* 414 U.S. 51, 59 (1973). Indeed, most states do employ a variety of less severe selection methods without damage to the party or state structure. Conceptually a good number of other U.S. 23, 46 fn. 8 (Harlan, J., concurring). Considering the broad range of less restrictive alternatives schemes are possible. *See Williams v. Rhodes,* 393 available and the importance of the rights involved herein, any reasons favoring the unit rule recede into insignificance.

CONCLUSION

This Appeal raises several substantial questions of first impression. It relates to matters of great public importance and fundamental concern. As argued herein, the resolution of these questions by the District Court is not free from considerable doubt. Since the questions presented are likely to arise in subsequent cases and since this Appeal comes before the Court in a timely manner, it is respectfully submitted that probable jurisdiction should be noted and the cause set for plenary consideration.

Dated: November 14, 1975.

Respectfully submitted,
JAMES S. GRAHAM,
ODELL & GRATHWOHL,
Appellant Pro Se.

JAMES E. SHELDON,
TESTA, HURWITZ & THIBEAULT,
JAMES F. BLUMSTEIN,
Of Counsel.

MOTION FOR EXPEDITED HEARING

I, JAMES S. GRAHAM, declare:

I am a Member of the California Bar admitted to practice on December 19, 1973. This affidavit is submitted to apprise the Court of the time considerations surrounding this appeal.

Under Cal. Elec. Code § 2503 the next California presidential primary will be held on June 8, 1976. However, candidates will begin to allocate their resources among the states at a much earlier date since several primaries will take place prior to that time. Appellant is informed and believes that the first primary will be in New Hampshire since N.H. Rev. Stat. Ann. § 57:1 has recently been amended setting the next primary date for February 24, 1976.

In light of these timing considerations, Appellant respectfully requests that should this Court believe plenary consideration to be warranted in this case, that a hearing date be set for some time next year on a schedule that would be consistent with the needs of deliberate judicial review as well as the interests of candidates and voters.

JAMES S. GRAHAM

Subscribed and sworn to before me
this 19th day of November, 1975.

DAPHNE M. STANNARD
Notary Public for the City and County of
San Francisco and the State of California

(Appendices Follow)

APPENDIX

Appendix A

United States District Court
Northern District of California

James S. Graham, Plaintiff, vs. March Fong Eu, Secretary of State, and Republican State Central Committee of California, Defendants.	No. C-74-487 SC
Chet Hollifield, et al., Plaintiffs, vs. March Fong Eu, Secretary of State, Defendant.	No. S-2489 SC

[Filed July 28, 1975]

Before: BROWNING, Circuit Judge, and EAST and CONTI, District Judges*

CONTI, D.J.:

These cases raise a constitutional question of first impression, specifically, to what extent, if any, are the

*Honorable James R. Browning, United States Circuit Judge for the Ninth Circuit, William G. East, Senior United States District Judge for the District of Oregon, and Samuel Conti, United States District Judge for the Northern District of California, constituting a statutory three-judge District Court by designation of Chief Judge Richard H. Chambers for the Ninth Circuit, dated April 8, 1974.

respective plaintiffs entitled to representation at the Republican and Democratic national conventions. Plaintiff in No. C-74-487 SC is a registered Republican voter in California. He instituted suit on his own behalf against the Republican State Central Committee of California and the Secretary of State of California. The plaintiffs in No. S-2489 SC are registered Democratic voters in California. On their own behalf and for all who are similarly situated[1] they have sued the Secretary of State of California.

Both cases originated as challenges to a statewide-at-large system of electing delegates from California to the Republican and Democratic party conventions.[2] The Democratic plaintiffs were first to dispute the validity of the scheme by bringing the second entitled lawsuit on June 23, 1972, in District Court for the Eastern District of California. That court denied plaintiffs' request for the convening of a three-judge court and dismissed the complaint. Plaintiffs' appeal resulted in an order of reversal and remand necessitating the convening of a three-judge court. In the meantime, the Republican plaintiff filed his case in this District Court for the Northern District of California and also requested the convening of a three-judge court. His request was granted. Furthermore, by order of the Chief Judge of this Circuit this court was specially assigned to the Eastern District of California in order that these two cases could be heard on a consolidated basis. Accordingly, a hearing on the merits of both cases was held on February 26, 1975.[3]

The contested manner of electing delegates to the Republican National Convention is set forth chiefly at California Elections Code §§6000 - 6262 and §§10260 - 10265. Provisions of the Elections Code pertinent to this case are reproduced in the margin.[4] The focus of Graham's challenge is the fact that under present state law Republican voters cannot cast votes for individual candidates for the position of delegate to the Republican Party's convention.[5] Instead, a Republican must vote for a bloc of delegates who are committed to the candidacy of a presidential aspirant.[6] And even then a voter does not cast a ballot for the members of one slate of delegates as opposed to the members of another, since the names of individual candidates who comprise the various slates are not listed on the ballot.[7] Only the names of the presidential aspirants[8] appear on the ballot. And whichever aspirant collects the highest number of votes is entitled to have that entire slate of delegates supporting his or her candidacy certified exclusively to represent California at the Republican National Convention. In this sense, therefore, the entire California delegation to the convention is a reward to the victorious Republican candidate and the primary—to borrow the vernacular expression—is winner-take-all.[9]

The procedure established by California for electing delegates to the Democratic National Convention, although once the same as for Republicans, is now markedly different.[10] Fearing a return to a statewide-at-large election of delegates to the Democratic Na-

tional Convention,[11] the Democratic plaintiffs have joined in the Republican plaintiff's attack on the constitutional validity of a winner-take-all system.[12] Moreover, they seek a declaration of unconstitutionality as to the recently promulgated, but as yet unused, Alquist Open Presidential Primary Act.[13] This act permits voting for individual delegates rather than for slates and promotes selecting convention delegates from Congressional districts rather than on a statewide basis. Under the Alquist Act once the number of delegates in the Democratic Party's call for California is ascertained, 75% of the delegates in the call will be assigned to each of California's forty-three Congressional districts in accordance with an apportionment formula which reflects the strength of the Democratic Party in that district.[14] Steering committees, committed to no-one in particular nor to a specific presidential aspirant, will prepare forty-three slates of candidates for the delegate positions assigned to each district.[15] And every slate of delegates will be entirely pledged to the nomination of a particular presidential candidate or be totally uncommitted.[16] The ballots will list the names of all candidates running for a delegate position from an individual district, as well as their presidential preferences, and a voter will be confronted with the following instructions:

> "You are not required to cast all of your votes for candidates pledged to the same presidential candidate. You may distribute your votes among individual candidates for delegates pledged to different presidential candidates or you may cast all your votes for candidates pledged to the same presidential candidate.
>
> "Vote for [number[17]] delegates."[18]

After the election results have been recorded, the elected delegates will meet to choose the remaining 25% of the party call for California.[19] This will be accomplished by holding separate caucuses of the elected delegates who are pledged to the various candidates or who are members of an uncommitted delegation.[20] Each caucus will be entitled to select the same percentage of the remaining 25% of the California Democratic Party's call as the number of delegates comprising the caucus is of the total number of elected delegates.[21]

Each of these delegate election schemes, plaintiffs allege, create invidious discriminations against those who cast ballots for losers and accordingly violate rights guaranteed the losing voters by the First and Fourteenth Amendments. The Republican plaintiff argues that electing California's delegates to his party's national convention from each Congressional district—a system incorporated in the new scheme for Democrats—would comport with federal constitutional requirements. On the other hand, we understand the Democratic plaintiffs to argue that nothing short of a statewide election of delegates on a proportional basis[22] is permissible.

Plaintiffs contend that failure to provide convention representation for those who support losing candidates is an unconstitutional denial of "fair and effective representation" and the "right to cast an

effective ballot."[23] The argument is that the Equal Protection Clause prohibits the state from denying losers balanced representation in the forum in which a presidential nominee is finally chosen. This interpretation of the Equal Protection Clause was rejected by the Supreme Court in *Whitcomb v. Chavis,* 403 U.S. 124 (1971).[24]

Whitcomb involved a challenge to a state statute establishing Marion County, Indiana, as a multi-member district for the election of state legislators. A central thesis of the plaintiffs' case was the same as that presented here: that is, that the winner-take-all aspect of a multi-member district disenfranchises those who support losers, since they have no representative of their own, and at the same time overrepresents those who support winners, since they receive all of the legislative seats with less than all of the popular vote. The Court explained that these results are simply consequences of losing elections. Briefly put, it is not "a denial of equal protection to deny legislative seats to losing candidates." 403 U.S. at 153. The Court rejected the contention "that any group with distinctive interests must be represented in [the final decision-making forum] if it is numerous enough to command at least one seat." 403 U.S. at 156.

The Court warned that multi-member districts may run afoul of the Equal Protection Clause if in fact they "'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" 403 U.S. at 143, *quoting Fortson v.*

Dorsey, 379 U.S. 433, 439 (1965), and *Burns v. Richardson,* 384 U.S. 73, 88 (1966). The Court pointed out, however, that it does not suffice to show that an identifiable group has perennially failed to elect representatives in proportion to its voting strength. 403 U.S. at 149. It must be factually demonstrated that the group allegedly discriminated against "had less opportunity than did other[s] . . . to participate in the political processes and to elect [delegates] of their choice." *Id.* Neither set of plaintiffs has made such a showing with respect to the California system of selecting delegates for the two major parties.[25]

The Republican plaintiff argues that the essential vice of the Republican primary is its statewide character. With respect to a state as large and populous as California, "fair and effective representation," he contends, requires that delegates to the national convention be selected in district elections so that minority interests within the California population may have a better chance to elect some delegates of their choice. The size of a district is not in itself a sufficient reason to impose judicial redistricting, even if the "district" is co-extensive with state boundaries. The Court has noted that a case of vote dilution with respect to an identifiable group might be easier to prove "when the [multi-member] district is large and elects a substantial proportion of the seats in either house of a bicameral legislature." *Whitcomb v. Chavis, supra,* 403 U.S. at 143. But whether or not the size factor is present, "proof of lessening or can-

cellation of voting strength must be offered." *Chapman v. Meier,* 420 U.S. 1, 17 (1975).[26]

Finally, the Republican plaintiff suggests that *Whitcomb* should be distinguished on the ground that in *Whitcomb* the plaintiffs had been given an equal opportunity to participate in the direct primary election at which legislative candidates were finally chosen, while in this case the winner-take-all rule is applied at a preliminary stage of the nomination process. *See Whitcomb v. Chavis, supra,* 403 U.S. at 149. The Constitution does not require that voters be afforded an opportunity to participate at either final or preliminary stages in the nomination process for presidential candidates. Whether the voters will participate in the delegate selection process, and, if so, at what stage, and whether their participation will be translated directly into delegate representation at the national conventions are matters for the political parties themselves to determine,[27] and, if the parties permit it, for the states.[28] *Cf. Fortson v. Morris,* 385 U.S. 231, 233, 234 (1966). Assuming the Equal Protection Clause to be applicable here, it requires only that when an election is held in the delegate selection process, the weight assigned to individual votes cannot depend on where individual voters live or whether they belong to identifiable racial or political groups. *See Developments in the Law, Elections,* 88 Harv. L. Rev. 1111, 1118-19 (1975). There are no claims of geographic discrimination in these cases,[29] and neither set of plaintiffs has made a factual showing of discrimination against

an identifiable racial or political group. All that appears is that losing voters are denied convention representation, not because of their support of particular candidates, but because the candidates they have been chosen to support have lost an election. This is not a denial of equal protection.[30]

The Republican plaintiff briefly suggests that the winner-take-all Republican primary is an unacceptable infringement on "the right of individuals to associate for the advancement of political beliefs," because the supporters of losing candidates are denied the opportunity to be heard at the national convention, through their own delegate representation. "The right to have one's voice heard and one's views considered by the appropriate governmental authority is at the core of the right of political association." *Williams v. Rhodes,* 393 U.S. 23, 41 (1968) (Harlan, J., concurring). But the right to bring one's views to the attention of a final decision-making forum does not include a right to official representation within the forum itself. If the right of association included a right of proportional representation, *Whitcomb v. Chavis* could not have been decided as it was. *Cf. Cousins v. Wigoda,* 419 U.S. 477, 488 n.8 (1975).

For these reasons, and on the records developed in these cases, we conclude that the California methods of electing delegates to the two major national conventions do not violate the First or Fourteenth Amendment rights of those who vote for losing candidates.

With respect to the Republican primary, we wish to add that we find support for our conclusion in the analogy between this statewide primary and the universal practice of electing presidential electors on a statewide winner-take-all basis. In *Williams v. Virginia State Board of Elections,* 288 F. Supp. 622 (E.D. Va. 1968), *aff'd mem.,* 393 U.S. 320 (1969), use of the winner-take-all election was upheld in the electoral college context against the very arguments that the Republican plaintiff makes against the California winner-take-all primary.[31] The plaintiffs in *Williams v. Virginia State Board of Elections* sought to have the winner-take-all method of choosing electors declared invalid and to require Virginia to provide for the election of presidential electors from districts within the state. They argued that the winner-take-all system debased, abridged, and misrepresented the weight of votes cast by persons within Virginia by overvaluing the votes of those who voted for the plurality winner and discarding the votes cast for losers. The court recognized that the unit rule might produce objectionable results, including election of a President who had not received a plurality of the popular vote in the nation as a whole, but it read the one person-one vote cases to require only that each citizen's vote be of equal weight in the election itself:

> "In the selection of electors the [winner-take-all] rule does not in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote. Admittedly, once the electoral slate is chosen, it speaks only for the element with the largest number of votes. This in a sense is discrimination against the minority voters, but in a democratic society the majority must rule, unless the discrimination is invidious. No such evil has been made manifest here. Every citizen is offered equal suffrage and no deprivation of the franchise is suffered by anyone."

288 F. Supp. at 627.[32]

In short, the Constitution does not require that when a state provides that its citizens shall vote for presidential electors the votes for losing candidates must be made more "effective" by affording, through districting, a greater opportunity for those votes to be translated into voting strength in the electoral college itself.[33]

The Republican plaintiff seeks to distinguish the holding in *Williams v. Virginia State Board of Elections* on a number of grounds. First, he argues that while Article II, Section 1, expressly grants the states broad power in deciding how to appoint electors, it does not grant the states any authority with respect to the nomination of presidential candidates. It is true that "[t]he States themselves have no constitutionally *mandated* role in the great task of the selection of Presidential and Vice-Presidential candidates," *Cousins v. Wigoda, supra,* 419 U.S. at 489-90 (emphasis added), but this does not mean that the states are prohibited from legislating in the area, at least insofar as the legislation is not inconsistent with party policy. For the moment, at least, California *does* have a role in deciding how California voters

will participate in the selection of the Republican nominee for President. Plaintiff does not contend otherwise. In furtherance of its power, however derived, California has passed a statute providing for a winner-take-all election, just as it has provided for the selection of presidential electors on a statewide basis.[34]

It is difficult to see how the source of the state's power to provide election machinery has any bearing on whether the state has exercised that power in a way that satisfies the Fourteenth Amendment. In *Williams v. Virginia State Board of Elections, supra,* 288 F. Supp. at 626, the Court recognized that the power expressly granted to Virginia under Article II, Section 1, was nevertheless limited by the Fourteenth Amendment. Had the court determined that the winner-take-all method conflicted with the Fourteenth Amendment, nothing in Article II, Section 1, would have prevented the court from imposing the districting remedy. After considering allegations of vote dilution and cancellation that are indistinguishable from those presented in this case, the court specifically held that the winner-take-all election was consistent with the Equal Protection Clause. Nowhere did the court suggest that the express grant of authority under Article II, Section 1, somehow relaxed the otherwise applicable standard of review under the Fourteenth Amendment. *See Williams v. Rhodes, supra,* 393 U.S. at 29.

The Republican plaintiff points to the fact that selection of presidential electors is next to the final

stage of the process of selecting a President. By way of contrast, the Republican plaintiff argues:

> "The selection of delegates within each state constitutes only a preliminary part of the multifaceted processes leading to the selection of a president. At this level full recognition of voter sentiment is imperative. If nominating procedures are structured so as to allow minorities to control the intermediate stages of the nominating processes, there is substantial risk of having the presidential nominee reflect the will of only a narrow political faction."

The force of the electoral college analogy does not derive merely from the fact that the selection of convention delegates is part of the overall presidential election process, although this relationship may justify reliance on the electoral college analogy in the first instance. *See Bode v. National Democratic Party,* 452 F.2d 1302, 1307-09 (D.C. Cir. 1971). *Compare Gray v. Sanders,* 372 U.S. 368, 378 (1963). The electoral college system is pertinent because it operates to select a single winner from a field of candidates, just as the nominating process does. The choice of delegates to a national convention from which a single nominee must emerge occurs at the same stage in the nominating process as does the election of electors, who must, finally, choose a single President. For each system to operate, there must be exclusion of losing candidates at some point. If the Constitution does not require that electors be chosen from districts in order to make it more likely that votes for losing presidential candidates will be registered in the electoral college (the

final decision-making forum), it is not apparent why convention delegates must be chosen from districts in order to insure that all candidates for the nomination will have a greater opportunity for representation at the convention that finally selects a nominee. In each case, the selection of representatives to cast the ultimate vote is itself part of the narrowing process.

Finally, the Republican plaintiff points out that the electoral college members vote only once, in their respective state capitals, and if no winner emerges, the choice is left to the House of Representatives. In contrast, plaintiff argues, the convention is a deliberative body and therefore representatives of all candidates should be present. As noted *supra,* note 27, the extent to which a convention is deliberative depends largely on how the party and the states choose to structure the nominating process. Recent history demonstrates that the convention is usually no more deliberative than the electoral college. Frequently, one candidate emerges from the state primaries, conventions, and caucauses with so many committed delegates that his nomination is as assured as is the election of a particular presidential candidate after the general election but before the electors convene. In each case, the final decision-making forum is little more than a vote-registering mechanism. Only a single vote of the representatives is necessary to confirm a choice already made in the states.[35]

This opinion shall constitute the court's findings of fact and conclusions of law, in accordance with Rule

52 of the Federal Rules of Civil Procedure. The defendants shall prepare for the court, and serve upon plaintiffs, proposed forms of judgments in conformity with this opinion. The proposed judgments shall be lodged with the court and served upon plaintiffs within five (5) days following the filing of this opinion.

Dated: July 28, 1975.

James R. Browning
United States Circuit Judge

William G. East
United States District Judge

Samuel Conti
United States District Judge

FOOTNOTES

[1]We have not certified or rejected No. S-2489 as a class action. As will become evident, this will not be necessary.

[2]As discussed more fully below, a winner-take-all method is mandated by California Election Code §6201 (West 1961) for the election of California's delegation to the Republican National Convention and was mandated by former California law, e.g., Chap. 1821, §2 [1971] Calif.Stats. at 3965 (repealed 1974) for the election of California's delegation to past Democratic National Conventions.

[3]At the time of the February 26 hearing a motion for summary judgment on behalf of the Republican plaintiff was pending. In support of this motion the Republican plaintiff submitted his own declaration and the declarations of Daniel A. Mazmanian, a political scientist, and Representative Paul N. McCloskey, Jr., an unsuccessful candidate for the Republican presidential nomination in 1972. In opposition to the motion the defendant Republican State Central Committee submitted an affidavit by Putnam Livermore, a former Republican party official.

The parties were informed, without objection from any of them, that the February 26 hearing would serve both as a hearing on the Republican plaintiff's motion for summary judgment and as a trial on the

merits of both cases. All parties were afforded an opportunity to introduce testimony in support of their positions, but submitted the cases on the declarations and affidavits previously filed plus a statement of the vote for the California presidential primaries from 1912 to 1972, inclusive, introduced by defendant Secretary of State.

[4]§6020. Notice to secretary of state

The chairmen of the state central committee of each of the political parties qualified to participate in the presidential primary shall notify the Secretary of State on or before the first day of March immediately preceding the presidential primary as to the number of delegates to represent the state in the next national convention of his party.

§6050. Joinder of three or more voters as committee in proposing nomination of candidates for delegates

Any three or more voters of the state who are registered as intending to affiliate with the same political party may join as a committee in proposing the nomination of a group of candidates for delegates. The committee may elect its officers, select the candidates for delegates, select the chairman of the committee, arrange for the appointment of verification deputies, secure the endorsement of the person, if any, preferred by the committee as candidate for presidential nominee, appoint alternates, assemble and file all necessary papers, and take all other action which may be necessary for the organization and election of the group. The committee in performing its functions may act through its officers or designated representatives.

§6055. Endorsement of group by candidate for presidential nominee

Each group of candidates for delegates, which intends to pledge itself to the candidacy of a particular candidate for presidential nominee, shall have the endorsement of the candidate for presidential nominee for whom the members of the group have filed a preference. The endorsement of the candidate for presidential nominee shall be filed with the Secretary of State before the circulation of any nomination papers of a group of candidates pledged to the support of his candidacy as a presidential nominee.

§6081. Nomination paper

. . . upon the filing of nomination papers pursuant to this chapter, the persons named in such papers shall be voted upon as delegates to the respective national conventions of the several political parties, but their names shall not be printed upon the ballots of their respective parties.

§10261. Arrangement of ballot in parallel columns

The names of the candidates for delegates of any political party shall not appear upon the ballot. In lieu thereof the names of the persons preferred for President by each group of candidates, or the name of the chairman of each group that has designated no preference, shall be arranged upon the ballot of the party in a column . . .

§6260. Ballot; space for write-in

Notwithstanding any other provisions of law, a space shall be provided on the presidential primary ballot for an elector to write in the name of a candidate for President of the United States.

§6201. Certification of election

Immediately after he has compiled the returns of the votes for delegates, the Secretary of State shall issue a certificate of election as to each [political] party, to each person who is a member of the group which received the largest vote cast for any group of that party, such person thereby being elected as delegate to his national party convention.

§6262. Delegates to national convention

Any person who receives, by write-in vote, a plurality of the votes cast for President of the United States shall, within 10 days after the primary election, file a list of delegates to the national convention of his political party with the Secretary of State in the manner prescribed in Sections 6053 and 6054.

Although the names of the candidates for delegates do not appear on the ballot, their names are published in newspapers, Calif.Elec.Code §6172 (West Supp. 1975), and are posted in the county clerks' offices, Calif.Elec.Code §10010 (West Supp. 1975). Prior to 1941 the names of the candidates for delegates did appear on the ballot and a political party member could vote for any number of delegates up to the number of delegates in the party's call regardless of an individual delegate's preference as to a presidential nominee. Chap. 137, §7 (1915) Calif.Stats. at 284 (repealed 1941). At that time, however, a space was also provided so that a party member could vote for an entire slate of delegates pledged to one presidential candidate by making one mark on the ballot. *Id.* And an examination of the statements of the vote from 1912 through 1940 indicates that this straight

ticket means of voting was followed by the overwhelming number of voters.

[5]See Calif.Elec.Code §10317 (West Supp. 1975).

[6]The number of candidates for delegate status on each slate is the same as the number of delegates allotted to California by the Republican National Party. Calif.Elec.Code §6052 (West 1961); slates uncommitted to a particular presidential aspirant are permissible, Calif.Elec.Code §6001 (West 1961).

[7]Calif.Elec.Code §§6081 (West Supp. 1975), 10261 (West 1961).

[8]When a slate of delegates is not pledged to a particular presidential nominee the name of the chairperson of the delegation is listed on the ballot. Calif. Elec.Code §10261 (West 1961).

[9]California is not alone in resorting to a unit rule for election of delegates to the Republican National Convention. The laws of Oregon, Ore.Rev.Stat. §249.221(2) (1971), Rhode Island, RI.Gen.Laws §17-12.1-11 (Supp.1974), and the District of Columbia, D.C. Code Ann. §§1-1105(b)(3)-(5) (Supp. 1974-5), all provide for winner-take-all presidential primaries. However, due to the size of its population and a very real potential for political diversity, the effect of a winner-take-all rule is unquestionably most dramatic in California.

[10]The former practice of electing delegates to the Democratic National Convention on a winner-take-all

basis has been replaced by the procedures set forth in the Alquist Open Presidential Primary Act, Calif. Elec.Code §§6300-6390 (West Supp. 1975).

[11]The Democratic plaintiffs suggest that the Alquist Open Presidential Primary Act contravenes the state constitution. Brief for Democratic plaintiffs, at 28-29. We intimate herein no views on that matter. The author of the act has, however, introduced new legislation, Calif.S.B.No.288(1975), which would repeal the act.

[12]Brief for Democratic plaintiffs, at 20-22.

[13]Calif.Elec.Code §§6300-6390 (West Supp. 1975). The act is limited to the election of California's delegates to the Democratic National Convention.

[14]The formula is set forth at Calif.Elec.Code §6304 (West Supp. 1975):

> "The number of delegates which each congressional district may elect shall be based on a formula which apportions 75 per cent of the total delegation allocated to the state by the Democratic National Committee (rounded to the nearest whole integer) among the congressional districts in a manner which gives equal weight to the average of the vote in each district for Democratic candidates in the two immediately preceding presidential elections and to the Democratic Party registration in each district on January 1 of the presidential primary year."

[15]Calif.Elec.Code §§6375, 6376 (West Supp. 1975).

[16]Calif.Elec.Code §6378 (West Supp. 1975).

[17]The number of votes each voter is entitled to cast is equal to the number of delegates to be elected from that person's district. Calif.Elec.Code §10282 (West Supp. 1975).

[18]Calif.Elec.Code §10283 (West Supp. 1975).

[19]Calif.Elec.Code §6380.5 (West Supp. 1975).

[20]*Id.*

[21]*Id.*

[22]Brief for Democratic plaintiffs, at 5.

[23]It is easy to understand the Republican plaintiff's objection to the winner-take-all primary. When voters must choose among three or more presidential candidates (and, consequently, three or more slates of delegates), the possibility exists that the majority of voters will go unrepresented, while a minority enjoys overrepresentation at the convention. For example, this became a reality in the 1972 Democratic presidential primary in California, the last Democratic primary conducted under the winner-take-all rule. Senator McGovern received 1,550,652 votes or 43.5% of the total popular vote. But because he received the highest number of votes among the presidential candidates, according to state law the slate of delegates committed to his candidacy represented California exclusively at the convention, and the 2,013,866 California Democrats casting votes for other candi-

dates were completely unrepresented at the convention. The reason for the Democratic plaintiffs' dissatisfaction with the Alquist Open Presidential Primary Act is not as readily apparent. We infer from their argument that under the new act a minority of voters may go unrepresented or underrepresented at the national convention. *See* Brief for Democratic Plaintiffs, at 19. A complete lack of proper representation will occur, according to plaintiffs' argument, whenever none of the delegate candidates supporting a particular presidential aspirant are able to win a delegate position in any of California's 43 districts, but the statewide total of all votes cast for some delegate supporting that aspirant are proportionally sufficient to merit one or more places in the whole California delegation. Similarly, underrepresentation will occur whenever a presidential aspirant has managed to get at least one of the delegates supporting his or her candidacy elected but would be entitled to more places in the delegation if the votes were counted on a statewide basis.

[24]The Republican plaintiff places great reliance on Gray v. Sanders, 372 U.S. 368 (1963), invalidating a Georgia primary election system for various statewide officers. Under the Georgia scheme, each voter was given one vote. In counting the votes, a "county unit system" was employed, under which the popular vote was tallied on a county-by-county basis, the winners in the county elections were awarded the counties' unit votes, and the candidate with the most unit votes was declared winner of the primary. The Court held this

scheme invalid because it weighted "the rural vote more heavily than the urban vote and weight[ed] some small rural counties heavier than other larger rural counties." 372 U.S. at 379. During the course of litigation in *Gray,* Georgia amended its county unit system to allocate unit votes to the counties in proportion to their population. The Court held this did not cure the defect, stating:

> "The county unit system, even in its amended form . . . would allow the candidate winning the popular vote in the county to have the entire unit vote of that county. Hence the weighting of votes would continue, even if unit votes were allocated strictly in proportion to population. Thus, if a candidate won 6,000 of 10,000 votes in a particular county, he would get the entire unit vote, the other 4,000 votes for a different candidate being worth nothing and being counted only for the purpose of being discarded."

372 U.S. at 381 n.12.

The Republican plaintiff argues that under *Gray* it is impermissible to discard or "wash out" losing votes at a stage prior to actual nomination. *Gray* lays down no such rule. As explained in Gordon v. Lance, 403 U.S. 1, 5 (1971), the defect considered in *Gray* was solely that of "geographic discrimination," that is, "Votes for the losing candidates were discarded solely because of the county where the votes were cast." The Republican plaintiff makes no claim of geographic discrimination.

[25]Although the Republican party has employed a statewide winner-take-all system for over 30 years,

the Republican plaintiff has failed to demonstrate factually that any identifiable group has been denied, because of racial or political differences, an opportunity to participate in the Republican primary and to elect delegates of its choice.

With respect to the Demoractic plaintiffs, such a showing would be impossible at this time because the delegate selection system prescribed by the Alquist Act has not yet been applied in a primary election.

[26]The size factor to which the Court has referred concerns the legislative strength of a multi-member district in relation to the total number of legislative seats in either house of a bicameral state legislature. At the 1972 Republican Convention, the California delegation comprised only 7% of the total number of delegates.

[27]At least with respect to California's Republic primary, it could be argued that *Whitcomb* is distinguishable because the delegates elected in that primary are committed to support only the winner of the primary, and it is therefore certain that losing candidates will not be represented at the national convention. The argument is that vote dilution is inherent in the California primary, absent a requirement of proportional representation, because the delegates are not required to represent the interests of the entire constituency, as are representatives in legislative bodies. *See* Dallas County, Alabama v. Reese, ... U.S. ....., ... (1975). Definition the role of the convention delegate is initially a matter for the political party, not

the courts. *Cf.* Cousins v. Wigoda, 419 U.S. 477, 489-90 (1975). A political party may rationally decide either that the convention should be as representative and deliberative as possible, or, on the other hand, that intra-party disputes should be resolved largely within the delegate selection process itself, the convention serving principally as a vote-registering device to confirm choices already made. The Equal Protection Clause requires only that once the delegates' role is determined, any opportunity the voters may be given to participate in the delegate selection process cannot be denied or diminished on account of geographic, racial, or political differences.

See also Whitcomb v. Chavis, where the Court stated (403 U.S. at 155):

> "Moreover, even assuming bloc voting by the delegation contrary to the wishes of the ghetto majority, it would not follow that the Fourteenth Amendment had been violated unless it is invidiously discriminatory for a county to elect its delegation by majority vote based on party or candidate platforms and so to some extent predetermine legislative votes on particular issues. Such tendencies are inherent in government by elected representatives; and surely elections in single-member districts visit precisely the same consequences on the supporters of losing candidates whose views are rejected at the polls."

[28]We have been presented with no claim of conflict between party rules and state law with respect to California's method of selecting national convention delegates. *See* Cousins v. Wigoda, 419 U.S. 477 (1975). We note, however, that the California State

Democratic Central Committee has resolved to request a ruling from the Democratic National Committee regarding the validity, under party rules, of the selection procedures prescribed by the Alquist Act.

[29]*Compare* Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971); Georgia v. National Democratic Party, 447 F.2d 1271 (D.C. Cir. 1971); Doty v. Montana State Democratic Cent. Comm., 333 F. Supp. 49 (D. Mont. 1971); Maxey v. Washington State Democratic Comm., 319 F. Supp. 673 (W.D. Wash. 1970).

[30]Because of this conclusion we need not decide whether the California presidential primaries are justified by "compelling" state or party interests, and it cannot be said that the means chosen to select California delegates to the two major conventions are irrational in terms of the interest in selecting the best possible candidate and building a winning consensus in support of him. *See* A. Bickel, *Reform and Continuity* 57 (1971); *cf. Storer v. Brown,* 415 U.S. 724, 729-36 (1974).

[31]The winner-take-all method of choosing presidential electors was also challenged in an original action brought by 13 states against the other 37 and the District of Columbia. The 13 states sought to require that electors be chosen from districts, and, as an interim measure, to require that the electoral votes be cast in proportion to the popular vote each candidate received in the state. *See* R. Dixon, *Democratic Representation* 565-69 (1968). The Supreme Court refused

to entertain the suit. Delaware v. New York, 385 U.S. 895 (1966).

In Penton v. Humphrey, 264 F. Supp. 250 (S.D. Miss. 1967) (3-judge court), the court dismissed, for failure to state a claim, a complaint challenging the winner-take-all method. Relying on *Delaware v. New York,* the court rejected the plaintiffs' argument that each state's electoral votes must be divided according to the popular vote that each candidate received.

[32]The district court was also unimpressed with the argument "that on a national basis, the State unit system's cancellation of States' minority votes causes inequities and distortions of voting rights among citizens of the several States, by arbitrarily isolating the effects of votes cast by persons of a particular political persuasion or party in one State, from those cast by voters of the same persuasion or party in other States." 288 F. Supp. at 628. It viewed these interstate distortions as an inevitable consequence of the constitutional decision to fragment the election process among the several states. 288 F. Supp. at 628-29.

[33]In *Williams v. Rhodes, supra,* the Supreme Court held that the rights of supporters of George Wallace to associate to advance their political beliefs and to cast effective votes in the general election were infringed by statutory provisions that made it virtually impossible for them to get their candidate's name on the Ohio presidential ballot. But the right to cast an "effective" vote announced in *Williams v. Rhodes* insured only that supporters of a particular candidate

for President would have a reasonable opportunity to offer their candidate to the electorate and to vote for him themselves. The Court did not suggest that votes for a candidate who was placed before the electorate but lost would be considered ineffective unless Ohio's electors were apportioned among the candidates to reflect their popular support, or were selected from single-elector districts. In other words, it was not necessary that voter support be translated into voting strength in the electoral college, the final decision-making forum. The Court's affirmance in *Williams v. Virginia State Board of Elections* just a few months later confirms the limited reach of the "effective ballot" rationale of *Williams v. Rhodes,* one of the principal cases relied upon by the Republican plaintiff.

If the rationale of the two *Williams* cases, both of which dealt with the electoral college, is applied to the California primary, it is clear that the Constitution would require only that a candidate who has demonstrated at least some following among the electorate must be permitted to appear on the ballot so his supporters will have an effective choice among potential nominees and be assured that if the candidate appeals to enough voters he will capture all of California's delegates. The holding of the second *Williams* case would foreclose any argument that votes cast for a losing candidate must nevertheless be given some weight at the convention.

[34]In the early years of the Republic, the states chose electors in a variety of ways. In some states, the

electors were chosen by the state legislature, in some they were chosen by the people in a statewide winner-take-all election, and in others they were elected from separate districts within the state. Variants of each of these methods were also employed. *See generally* McPherson v. Blacker, 146 U.S. 1, 29-33 (1892). Virginia switched from district elections to the at-large general ticket method in 1800 on the advice of Thomas Jefferson. *Id.* at 31.

> "His advice sprang from a desire to protect his state against the use of the general ticket by other States. He found that when chosen by districts, Virginia's representation among the electors was divided, while other States made their votes mean more in the college by adoption of the general ticket scheme of selection. This contention is no less true today.

Williams v. Virginia State Board of Elections, *supra,* 288 F. Supp. at 626. After 1832, electors were chosen in winner-take-all elections in all of the states except South Carolina, where the legislature chose them through 1860. *McPherson v. Blacker, supra,* 146 U.S. at 32-33. Colorado's electors were chosen by the legislature in 1876, and Michigan used the district method of election in 1892. Since then, however, the winner-take-all election has been used in all of the states. W. Goodman, *The Two-Party System in the United States* 158-59 (3d ed. 1964).

The wide range of means employed in selecting convention delegates today is comparable to that which prevailed in the selection of presidential electors in the early days of the Republic. In some states, dele-

gates are elected in a winner-take-all election, in some they are appointed by state party committees, and in some they are selected in the course of caucuses or conventions at both the state and local levels. *See generally Nomination & Election of the President and Vice President of the United States,* Pamphlet prepared for the Office of the Secretary of the Senate 72-173 (1972).

[35]Voting for the Republican nominee has not gone beyond the first ballot since 1948. More than one ballot has been required at the Democratic convention only once (in 1952) since 1936, when the Democratic Party dropped the rule requiring that a nominee receive the votes of two thirds of the delegates. *See* R. Bain & J. Parris, *Convention Decisions & Voting Records,* Appendix C (1973).

Appendix B

United States District Court
Northern District of California

No. C-74-487 SC

James S. Graham,
Plaintiff,
vs.
March Fong Eu, Secretary of State, and Republican State Central Committee of California,
Defendants.

[Filed Sept. 9, 1975]

JUDGMENT AFTER DECISION BY THREE-JUDGE COURT

This action came on for trial on February 26, 1975 before the Court, the Honorable James R. Browning, United States Circuit Judge for the Ninth Circuit, William G. East, Senior United States District Judge for the District of Oregon, and Samuel Conti, United States District Judge for the Northern District of California, constituting a statutory three-judge District Court by designation of Chief Judge Richard H. Chambers for the Ninth Circuit, dated April 8, 1974, all presiding, and the issues having been duly tried

and a decision pursuant to an opinion which constitutes the Court's findings of fact and conclusions of law, having been rendered,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing by his complaint, that the rights of the plaintiff are declared in accordance with the opinion of the Court, that the action of the plaintiff is otherwise dismissed on the merits and that the defendants recover their costs therein.

Dated: September 9, 1975.

James R. Browning
United States Circuit Judge
William G. East
United States District Judge
Samuel Conti
United States District Judge

Appendix C

United States District Court for the
Northern District of California

NO. C-74-0487 SC

James S. Graham,
Plaintiff,

vs.

March Fong Eu, Secretary of State, and Republican State Central Committee of California,
Defendants.

[Filed Sept. 26, 1975]

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

To: The Clerk of the above entitled court, all parties and their attorneys of record herein:

Please Take Notice That pursuant to the provisions of 28 U.S.C. § 1253 Plaintiff James S. Graham hereby appeals to the Supreme Court of the United States from the final order and judgment dismissing the Complaint entered in this action on July 28, 1975. This notice is filed as required by 28 U.S.C. § 2101(b).

Dated: September 22, 1975.

By /s/ James S. Graham
James S. Graham
Attorney and Plaintiff

Affidavit of Service By Mail

State of California
County of San Mateo—ss.

Carole Jackson, being first duly sworn, on oath, deposes and states:

I am over 18 years of age, and not a party to the within cause; my business address is 1045 Alameda de las Pulgas, Belmont, California 94002. I served a true copy of the attached Notice of Appeal to the Supreme Court of the United States on each of the Counsel of Record for each party in that proceeding by placing the same in an envelope addressed as follows:

Charlton G. Holland, Esq.
Office of the Attorney General
6000 State Building
San Francisco, California 94102

Joseph A. Darrell, Esq.
Thelen, Marrin, Johnson & Bridges
2 Embarcadero Center
San Francisco, California 94111

Each said envelope was then on September 22, 1975, sealed and deposited in the United States mail at Belmont, California, with the first class postage thereon fully prepaid, as required by Rule 33, Rules of the U.S. Supreme Court.

/s/ Carole Jackson
Carole Jackson

Subscribed and sworn to before me
this 22nd day of September, 1975.

(Seal) Robert S. Odell, Jr.
Notary Public for the County of
San Mateo and the State of California

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-740

JAMES S. GRAHAM,

Appellant,

vs.

MARCH FONG EU, Secretary of State, et al.,

Appellees.

On Appeal from the United States District Court for the Northern District of California

Motion to Affirm

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Motion to Affirm

Pursuant to Supreme Court Rule 16 (1) (c), Appellee March Fong Eu, Secretary of State of the State of California, hereby moves to affirm the decision in this appeal on the ground that the questions presented are so unsubstantial as not to warrant further argument.

OPINION BELOW

The opinion and Declaratory Judgment issued below and unanimously concurred in by the District Court, as to which this Motion to Affirm is filed, is contained in Appendix A and Appendix B, respectively, of the Jurisdictional Statement of appellant Graham.

INTRODUCTORY STATEMENT

The opininon of the District Court below ably sets forth those decisions of this Court which justify this Court concluding that further argument is unnecessary. Appellee files this motion to affirm, relying basically upon the strength of the opinion of the District Court. What arguments that are advanced in this motion must be read in conjunction with the opinion of the District Court.

PROCEEDINGS BELOW

The statement of the proceedings below as described by the appellant are substantially correct. Jurisdictional Statement, pages 3-4. However, as the opinion of the District Court indicates, the trial of the instant matter was consolidated with the trial of *Hollifield, et al. v. Fong Eu, et al.* (U.S.D.C. Central District of California No. S-2489-SC), in which a challenge was made to the winner-take-all aspects of the procedure for selecting delegates pursuant to California law for the Democratic National Convention. This latter action had been filed on June 23, 1972. Subsequent proceedings are reported in the opinion of the District Court. Jurisdictional Statement, Appendix A, page ii. California's Elections Code 6386, which provided for the 1972 presidential primary of the California Democratic Party that the winner with the highest number of votes received all the delegates allocated to the state by the party call, was repealed and replaced with the "Alquist Open Presidential Primary Act" which in its current state is set forth at California Elections Code sections 6300 *et seq.* and sections 10266 *et seq.* (California Statutes 1975, Chapter 1111.) The plaintiffs in this latter action filed a notice of appeal on October 9, 1975. However, they have not docketed

their appeal by filing a jurisdictional statement or otherwise complying with Rule 13 of the Supreme Court Rules within ninety days from the date of entry of judgment on September 9, 1975. Jurisdictional Statement, Appendix B, page xxxii. It appears they have abandoned their appeal but, in the event they attempt to pursue it, defendant Eu will oppose any tardy attempt to docket their appeal.

At the February 26, 1975 hearing on the merits, in addition to the certified copies of the presidential primary election returns in California from 1912 to 1972, the defendant Eu also introduced the Rules adopted by the Republican National Convention held at Miami Beach, Florida on August 21, 1972. Rule 31, relating to the election of delegates to the national convention, is attached to this Motion as an Appendix A and is set forth in its entirety.

CALIFORNIA'S PAST AND PRESENT STATUTORY SCHEME FOR THE SELECTION OF DELEGATES TO THE REPUBLICAN NATIONAL CONVENTION—RELEVANT STATUTES.

At the February 26, 1975 trial of this action, California provided for the selection of delegates to the Republican National Convention in the following manner. A committee would form for the purpose of circulating nomination papers for the candidacy of delegates who preferred a particular candidate for nomination of the party for the office of president or who preferred no candidate. California Elecetions Code section 6050. The group of delegate candidates selected by the committee had to obtain the endorsement of the candidate it preferred. California Elections Code section 6055. A candidate for delegate had to pledge support to the candidate he preferred for nomina-

tion "to the best of my judgment and ability." California Elections Code section 6057. The nomination papers, containing signatures equal to a specified percentage of the party's last gubernatorial vote, had to be filed seventy-four days before the presidential primary. California Elections Code section 6081. Provision was made for the publication and posting of a list of the names of each group of delegate candidates pledged to a particular candidate. California Elecetions Code section 6172. However, the ballot contained only the name of the persons preferred by the groups of delegate candidates or the chairman of an uncommitted group of delegate-candidates. California Elections Code section 10261. Once the defendant Secretary of State received the returns of the vote from the county clerks, the defendant Secretary of State was required to issue immediately certificates of elections to each delegate of the group of delegate candidates, committed or uncommitted, that received the highest number of votes. California Elections Code section 6201.

Effective January 1, 1976, this system for the selection for delegates has been changed. (California Statutes 1975, Chapter 1048) The defendant Secretary of State is charged with the duty of selecting on or before February 1st of the presidential primary year those persons who are generally recognized throughout the state or nation as candidates for the nomination of the Republican Party for placement on the ballot of the presidential primary election. California Elections Code section 6010. Persons who are unselected must qualify for the ballot by filing nomination papers containing a specified number of signatures. California Elections Code section 6021. A selected candidate may withdraw by filing an affidavit of non-candidacy not later than sixty-

four days before the presidential primary. California Elections Code section 6011. Each selected or qualified unselected candidate who wishes to have a delegation certified to the national convention by the defendant Secretary of State must file a list of delegates pledged to him thirty days before the presidential primary. California Elections Code section 6070. Each delegate must use his "best efforts" on behalf of his candidate until such candidate receives less than 10% of the vote at the convention, releases his delegates or two nominating ballots are taken at the convention. California Elections Code section 6071 (2) (c). The ballot must contain no reference to "groups of candidates" expressing a preference and the presidential primary column shall state only "PRESIDENTIAL PREFERENCE, Vote for One," so that only the names of candidates for nomination shall appear on the ballot. California Elections Code section 6080. The candidate who receives the highest number of votes is issued a certificate of election as the party's presidential nominee candidate from California. California Elections Code section 6056. Each of his selected delegates shall also receive a certificate of election. California Elections Code section 6057.

The new system then does not change the "winner-take-all" aspects of the former method. However, the identity of the delegates pledged to the candidates for nomination is given no pre-election publicity and the obligations of the delegates are reduced from "best of my judgment and ability" to release after specified conditions have been fulfilled, submerging further their visibility to the voter but enlarging the potential scope of their individual influence and discretion at the convention.

THERE IS NO INVIDIOUS DISCRIMINATION IN THE DIFFERENT EFFECT GIVEN TO SUCCESS AND DEFEAT AT THE CALIFORNIA REPUBLICAN PRESIDENTIAL PRIMARY WHERE THE VOTERS ARE OTHERWISE GRANTED EQUAL PARTICIPATION IN THE ELECTION AND PARTY ACTIVITIES.

The appellant's claim of invidious discrimination is not based upon a classification such as sex, wealth, race, religion, ethnic origin or geographic location which this Court has found to be the occasion of discrimination prohibited by the Equal Protection Clause of the Fourteenth Amendment. He claims that, although all voters participate equally at the election, those who support a candidate who does not obtain the highest number of votes and therefore "loses" also lose their chance to be directly represented at the national convention. However, this loss of representation is solely a function of voting for a particular candidate and is not a function of the voter's prior inability to fully participate in the primary election or in the political activities of his party. At least two decisions of this Court hold that loss of representation by defeat at the polls does not constitute a basis for a finding of invidious discrimination.

In *Williams v. Virginia State Board of Elections,* 288 F. Supp. 622 (I.D. Va. 1968), aff'd 393 U.S. 320 (1969) the plaintiffs challenged the winner-take-all aspects by which presidential electors were chosen. However, the District Court rejected this challenge and declared that, as long as participation in the vote was equally available and weighted, there was no invidious discrimination against those voters who voted for losing candidates. Id. at 627.

California's winner-take-all Republican presidential primary is neutral in the sense it is biased against no ascertainable group (at least until after the canvass of the votes) or against any particular candidate. In this respect, it is

no different from the district, majority rule system of voting where the winner of the vote wins the right to represent the entire district, including those who voted for the losing candidate. The district, majority rule system, in the context of multi-member districts, has been upheld by this Court in the face of objections based upon their "winner-take-all" aspects.

In *Whitcomb v. Chavis,* 403 U.S. 124 (1971) this Court reversed the judgment of a District Court which had ruled that Indiana's law, providing that fifteen representatives and eight senators to the state legislature were elected at large from Marion County, acted to invidiously dilute the vote of ghetto blacks where under a single district system they would be more effectively represented at the state legislature by candidates who had to appeal and to be accountable to them directly. This Court pointed out in *Whitcomb* that in *Fortson v. Dorsey,* 379 U.S. 433, 439 (1965) it had refrained from holding that multi-member districts were per se unconstitutional but had left open the question where a showing might be made that there was a dilution of the vote of ". . . racial or political elements of the voting population." *Whitcomb* at 143. However, in *Whitcomb* the plaintiffs failed to sustain their burden of proof that the alleged lack of legislators reflecting "ghetto" interests was anything more than product of lost elections. This Court stated that the "winner-take-all" aspects of such districts did not mean they were automatically unconstitutional.

> "We are not insensitive to the objections long voiced to multi-member district plans. Although not as prevalent as they were in our early history, they have been with us since colonial times and were much in evidence both before and after the adoption of the Fourteenth Amendment. Criticism is rooted in their winner-take-all aspects, their tendency to submerge

minorities and to overrepresent the winning party as compared with the party's statewide electoral position, a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests. The chance of winning or significantly influencing intraparty fights and issue-oriented elections has seemed to some inadequate protection to minorities, political, racial, or economic; rather, their voice, it is said, should also be heard in the legislative forum where public policy is finally fashioned. In our view, however, experience and insight have not yet demonstrated that multi-member districts are inherently invidious and violative of the Fourteenth Amendment." (Footnotes omitted.) Id. at 137-140.

This Court later in *White v. Register,* 412 U.S. 755 (1972) upheld the disestablishment of multi-member districts where the district court had found that, in fact, black and Mexican-American voters ". . . had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." Id. at 766. In *Connor v. Johnson,* 402 U.S. 690 (1971) and in *Chapman v. Meier,* 420 U.S. 1 (1974) this Court has announced its preference for single member districts where a districting plan has been ordered by the district court and multi-member districts, as a political choice, did not emerge from the state legislature or were not evident in the state's immediate past. However, there is no judicial imposed primary in this proceeding and there was no evidence before the District Court that any voter has less opportunity than other voters to participate in the primary or in the conduct of party affairs. Accordingly, these decisions are relevant to the appellant's ap-

peal insofar as they affirm the holding of *Whitcomb* that, absent discrimination which prevents participation in the election and political process, a lack of representation based upon the loss of an election is not unconstitutional.

GRATUITOUS LANGUAGE OF THIS COURT IN GRAY V. SANDERS, 372 U.S. 368 (1963) HAS BEEN MISCONSTRUED BY THE APPELLANT AS RELEVANT TO THIS APPEAL.

The appellant relies heavily upon *Gray v. Sanders,* 372 U.S. 368 (1963), not so much upon the facts of that decision but upon language which appears in a footnote. Jurisdictional Statement, pages 14-15. In *Gray,* this Court held a Georgia direct primary system where the heavily populated counties were given a unit vote equal to that of the less populated rural counties as a violation of the "one-man, one-vote" principle. In a footnote, the comment was made that, even if the counties were equal in population, the system would still be unconstitutional since the votes cast for a losing candidate in a county would be a vote cast for ". . . the purpose of being discarded." Id. at 381 (footnote 12). This comment would be correct only if the candidate with the highest popular vote lost the primary because minor candidates bled off votes in some district sufficiently to cause him to lose by narrow margins in those districts. In any event, this Court specifically disavowed any impact of that footnote outside of the facts before the Court:

> "We do not reach here the questions that would be presented were the convention system used for nominating candidates in lieu of the primary system." Id. at 378 (footnote 10).

This footnote in *Gray* has not been given any application by this Court beyond the confines of the decision itself. This Court declared in *Fortson v. Morris,* 385 U.S.

231, 235 (1966) that *Gray* ". . . did no more than to require the State to eliminate the county-unit machinery from its election system. . . ." More recently, note must be taken of Justice Rehnquist's concurring opinion in *Cousins v. Wigoda,* 419 U.S. 477, 494 (footnote 1) (1975), referring to footnote 10 in *Gray,* that such "gratuitous observations" are not favored where the issue was not presented to the Court for resolution.

THE MANNER IN WHICH THE NATIONAL PARTY PERMITS THE STATES TO SELECT THEIR DELEGATES IS MANIFESTLY WITHIN THE FIRST AMENDMENT ASSOCIATIONAL RIGHTS OF THE NATIONAL PARTY.

The Rules which shall govern the proceedings of the 1976 Republican Convention provide that delegates shall be elected in conformity with state law. Specifically, Rule 31 which is set forth in its entirety as Appendix A, provides:

> "Delegates at Large to the National Convention and their alternatives and Delegates from Congressional Districts to the National Convention and their Alternate shall be elected in the following manner: (a) *By primary election in accordance with the applicable laws of such States as required by law,* the election of Delegates to the National Conventions of political parties by direct primary and in the District of Columbia in accordance with its law. . . ." [Emphasis supplied.]

There is no statement in the Rules which adopts in general or which imposes the winner-take-all system upon the California Republican Party. It is clear, nevertheless, that the present party Rules permit its use and that delegates selected in California under that system will be seated pursuant to Rule 31 (a) quoted above. Rule 31, regarding the election of delegates, is set out in its entirety in Appendix

A because it illustrates the diversity of selection procedures of the state parties which respond to the national party's call. It is clear from Rule 31 that the national party has made a fundamental determination to permit the state parties determine the method by which they will send delegates to the national convention. It is submitted that this determination by the national party is within its associational rights protected by the First Amendment and is thereby not subject to intrusion by this Court.

This Court has ruled that the seating of delegates to the national party convention come within the protection of the First Amendment as part of associational rights. In *Cousins v. Wigoda,* 419 U.S. 477 (1975), the Democratic voters of Chicago had elected "Wigoda" delegates at the presidential primary to the 1972 Democratic National Convention in conformity with Illinois election law. The "Cousins" delegates, included some delegates who had been defeated at the Illinois primary, challenged the seating of the *Wigoda* delegates on the ground that the delegates had not been selected by procedures and slate-making rules previously adopted by the party. The convention refused to seat the *Wigoda* delegation and seated the *Cousins* delegation. An Illinois Court enjoined the *Cousins* delegates from participating in the convention or accepting seats. This Court, on appeal from the Illinois Court's judgment of contempt against the *Cousins* delegates after they ignored the injunction, held that the determination of the convention regarding delegate creditation had "primacy" over state law. Id. at 483. Preliminarily, this Court held the national convention is an association protected by the First Amendment:

> "The National Democratic Party and its adherents enjoy a constitutionally protected right of political association. There can no longer be any doubt that

> freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments . . . The right to associate with the poltical party of one's choice is an integral part of this basic constitutional freedom. *Kusper v. Pontikes,* 414 U.S. 51, 56-57 (1973). . . ." Id. at 487.

Moreover, this Court held that the qualifications and eligibility of delegates was a matter for the decision of the convention. Id. at 490. This Court went as far as to state that:

> "The Convention was under no obligation to seat the respondents but was free, as respondents concede,[8] to leave the Chicago seats vacant and thus defeat the objective." Id. at 488 [Footnote not quoted.]

There was no claim in *Cousins* that the procedures employed for delegate selection were unconstitutional. Holding that in mind, this Court quoted an earlier decision involving convention delegates to the effect that "'. . . the convention itself (was) the proper forum for determining intra-party disputes as to which delegates (should) be seated.'" Id. at 491 (quoting from *O'Brien v. Brown, infra,* 409 U.S. 1, 4 (1972)). Here, the plaintiff has made a claim that the delegate selection process is unconstitutional. However, the constitutional infirmity he asserts, based solely on the success or loss of a yet to be ascertained candidate, is not one recognized by this Court, and was rejected under the reasoning in *Whitcomb* and *Williams*. Nevertheless, granting that unlike the petitioners in *Cousins* the appellant has challenged the procedures under which delegates are selected, appellee urges upon this Court that the decision to accept or reject California's delegation must be left to the convention and its appropriate contest and credentials committees

as manifestly within the First Amendment associational rights of the National Republican Party.

This Court in *O'Brien v. Brown, supra* 409 U.S. 1 (1972) issued a stay of extraordinary relief ordered by the Court of Appeals for the District of Columbia where the Court of Appeals had ordered the 1972 Democratic Party Convention to admit as delegates persons who had been elected pursuant to California's winner-take-all primary but who had been unseated by the Credentials Committee of the convention. This Court issued its stay, recognizing that it was presented with ". . . relationships of great delicacy that are essentially political in nature." Id. at 4. Furthermore, this Court stated:

> "It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. Highly important questions are presented concerning justiciability, whether the action of the Credentials Committee is state action and, if so, the reach of the Due Process Clause in this unique context. Vital rights of association guaranteed by the Constitution are also involved. While the Court is unwilling to undertake final resolution of the important constitutional questions presented without full briefing and argument and adequate opportunity for deliveration, *we entertain grave doubts as to the action taken by the Court of Appeals.*" Id. at 4-5. [Emphasis supplied.]

Appellee Eu submits that when a political party establishes procedures for the selection of delegates and nominees for elective office that are neutral as to identifiable groups

or particular candidates the nature of those procedures are within the rights of association protected by the First Amendment. The appellant bemoans the loss of representation of the California party member, who voted for a losing candidate, at the convention. The appellant, however, assumes whether the convention is purely deliberative (no lawfully binding committments), purely registering (each delegate pledged to a candidate) or a combination of these is not a question for the party itself to determine. The appellant overlooks or ignores that the national political convention is not an on-going deliberative assembly for the enactment of legislation. Its function is to serve as a vehicle by which the party selects candidates for President and Vice-President who must be successful at the general election if the party is to survive. The delegates have no tenure of office such that they can be later held accountable for their choices before the voters. There is a limited time for the large number of these delegates who do not contemplate a continuous relationship and who do not necessarily have any experience in assembly deliberations to render their decision. Accordingly, the decision of the Party to leave the question of the selection of delegates to states, serves the purpose of permitting each state party to determine how to overcome these inherent difficulties at the national convention and yet best reflect the sentiments of the members of the party within the state. This *modus vivendi* among the state parties unquestionably involves ". . . relationships of great delicacy that are essentially political in nature." *O'Brien v. Brown*, 409 U.S. 1, 4 (1972). For this Court to intrude upon this decision by the national party would be to substitute its judgment for that party regarding the best balance to be struck between representa-

tion of party members at the convention and the necessity of the party to produce successful nominees. This Court has traditionally shunned that role and should so refuse in this appeal.

CONCLUSION

For the reasons given above, the issue presented by this appeal is so unsubstantial that further argument is not warranted. This motion for affirmance should be granted.

Respectfully submitted,

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Appendix A

ELECTION OF DELEGATES TO NATIONAL CONVENTION

RULE NO. 31

Delegates at Large to the National Convention and their Alternates and Delegates from Congressional Districts to the National Convention and their Alternates shall be elected in the following manner:

(a) By primary election in accordance with the applicable laws of such States as required by law, the election of Delegates to the National Conventions of political parties by direct primary and in the District of Columbia in accordance with its law; provided, that in any of these in which Republican representation upon the Board of Judges or Inspectors of Elections for such primary election is denied by law, Delegates and Alternates shall be elected as hereinafter provided.

(b) By Congressional District or State Conventions, as the case may be, to be called by the Congressional District or State Committees, respectively. Notice of the Call for any such Convention shall be published in a newspaper or newspapers of general circulation in the Congressional District or State, as the case may be, not less than fifteen (15) days prior to the date of said Convention.

(c) In selecting Delegates and Alternates to the National Convention, no State law shall be observed which hinders, abridges or denies to any citizen of the United States, eligible under the Constitution of the United States, to the office of President or Vice President, the right or privilege of being a candidate under such State law for the nomination for the President or Vice President; or which authorizes the election of a number of Delegates or Alternates from any State to the National Convention different from that fixed in these Rules.

(d) By the Republican State Committee or Governing Committee in any State in which the law of such State specifically authorizes the election of Delegates or Alternates in such manner.

(e) In a Congressional District where there is no Republican Congressional Committee, the Republican State Committee shall issue the Call and make said publication.

(f) All Delegates from any State may be chosen from the State at Large, in the event that the laws of the State in which the election occurs, so provide.

(g) Alternate Delegates shall be elected to said National Convention for each unit of representation equal in number to the number of Delegates elected therein and shall be chosen in the same manner, at the same time, and under the same rules the Delegates are chosen; provided, however, that if the law of any State shall prescribe the method of choosing Alternates they shall be chosen in accordance with the provisions of the law of the State in which the election occurs.

(h) The election of Delegates and Alternates from the District of Columbia, Guam, Puerto Rico, and the Virgin Islands shall be held under the direction of the respective recognized Republican Governing Committee therein in conformity with the Rules of the Republican National Committee or the laws of the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

(i) Election of Delegates and Alternates shall be certified in every case where they are elected by Conventions, by the Chairman and Secretary of such Conventions, respectively, and forwarded to the Secretary of the Republican National Committee, and in the case of election by Primary, they shall be certified by the proper official and all certificates shall be forwarded by said duly elected Delegates and Alternates in the manner herein provided.

(j) All Delegates and Alternates shall be elected not later than thirty-five (35) days before the date of the meeting of said National Convention, unless otherwise provided by the laws of the State in which the election occurs.

(k) Delegates and Alternates at Large to the National Convention when serving as Delegates and Alternates shall be duly qualified voters of their respective States. All Delegates and Alternates allocated as Delegates and Alternates at Large shall be elected at Large in the several States unless otherwise provided by State law.

(l) Delegates and Alternates to the National Convention, representing Congressional Districts, shall be residents and qualified voters in said districts respectively when serving as Delegates and Alternates. All Delegates and Alternates allocated to represent Congressional Districts shall be elected by the Congressional District of the several States unless the laws of the State shall otherwise provide.

(m) No Delegate or Alternate Delegate shall be required to pay an assessment or fee in excess of that provided by the law of the State in which the election occurs as a condition of serving as a Delegate or Alternate Delegate to the Republican National Convention.

ELECTION OF DELEGATES TO DISTRICT AND STATE CONVENTIONS

Delegates to Congressional District and State Conventions shall be elected under the following rules:

(n) Only legal and qualified voters shall participate in a Republican primary, caucus, mass meeting, or mass convention held for the purpose of selecting Delegates to a County, District, or State Convention, and only such legal and qualified voters shall be elected as Delegates to County, District and State Conventions: provided, however, that in

addition to the qualifications provided herein the governing Republican Committee of each State, shall have the authority to prescribe additional qualifications not inconsistent with law. Such additional qualifications shall be adopted and published in at least one daily newspaper having a general circulation throughout the State, such publication to be at least ninety (90) days before such qualifications shall become effective.

(o) No Delegates shall be deemed eligible to participate in any convention to elect Delegates to the said National Convention, who were elected prior to the date of issuance of the Call of such National Convention.

(p) District Conventions shall be composed of Delegates who are legal and qualified voters therein, and Delegates to State Conventions shall be qualified voters of the respective districts which they represent in said State Conventions. Such Delegates shall be apportioned among the counties, parishes, and cities of the State or District having regard to the Republican vote therein.

(q) There shall be no proxies at a convention held for the purpose of selecting Delegates to the Republican National Convention. If Alternate Delegates to such selection Convention are selected, the Alternate Delegate, and no other shall vote in the absence of the Delegate.

(r) There shall be no automatic Delegates at any level of the Delegate selection procedures who serve by virtue of Party position or elective office.

(s) The Republican National Committee shall assist the States in their efforts to inform all citizens how they may participate in Delegate selection procedures. The Republican National Committee in cooperation with the States shall prepare instructive material on Delegate selection methods and make it available for distribution.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-740

JAMES S. GRAHAM,

Appellant,

VS.

MARCH FONG EU, Secretary of State,
and REPUBLICAN STATE CENTRAL COMMITTEE
OF CALIFORNIA,

Appellees.

On Appeal from the United States District Court
for the Northern District of California

Motion to Affirm

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Appellees.

On Appeal from the United States District Court for the Northern District of California

Motion to Affirm

Appellee, Republican State Central Committee of California (hereinafter referred to as "RSCCC"), moves, pursuant to Supreme Court Rule 16, to affirm the judgment of the District Court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

After the presentation of evidence and hearing arguments on the merits, the District Court held that the Republican Party's winner-take-all presidential primary election

system as established by California statute did not violate appellant's rights under the Equal Protection Clause of the Fourteenth Amendment or the First Amendment. The District Court relied principally on this Court's decisions in *Whitcomb v. Chavis,* 403 U.S. 124 (1971), and *Williams v. Virginia State Board of Elections,* 288 F. Supp. 622 (E.D. Va. 1968), *aff'd mem* 393 U.S. 320 (1969), which upheld the constitutionality of the winner-take-all rule within, respectively, the contexts of legislative apportionment schemes and the Electoral College.

Relying upon the standards set forth in *Whitcomb,* the District Court found that appellant had failed to prove that any identifiable group "had less opportunity than did other[s] . . . to participate in the political process and to elect [delegates to the National Convention] of their choice." *Whitcomb v. Chavis, supra* at 149.

ARGUMENT

I. California's Winner-Take-All Republican Presidential Primary Election Does Not Violate the Equal Protection Clause.

In this action appellant seeks to declare Cal. Elec. Code § 6201 unconstitutional on the grounds that California's "winner-take-all" Republican presidential primary election violates the Equal Protection Clause of the Fourteenth Amendment.[1] His theory is that the winner-take-all primary

1. Citations to the California Election Code are to sections which were in effect at the time of trial. On September 24, 1975 the provisions of former Chapter 1, commencing with Section 6000, of Division 5 of the California Elections Code was repealed and superseded by Assembly Bill No. 427. The new law modifies the procedure for presidential primary elections of the Republican Party in California, but retains the winner-take-all rule of the former statute. Sections 6056, 6071(c), Cal. Elec. Code. Assembly Bill No. 427 is set forth in the Appendix.

violates the Equal Protection Clause because it does not afford proportionate representation at the National Convention of the various political factions within the Party.

To date the only decisions by this Court applying equal protection principles to the electoral process have involved the first tier of the electoral process, *i.e.,* the method by which representatives are chosen. At no time has this Court ruled that various political factions are entitled to proportionate representation. It has merely ruled that eligible voters must have equal access to the political process, that all votes be weighed equally, and that the election procedure may not contain a built-in bias which dilutes or cancels the voting strength of identifiable racial or political groups.[2]

2. For example, the *White Primary Cases* collectively held that the Equal Protection Clause was violated by systems which prevented blacks from participating in primary elections or in state nominating conventions held in lieu of primary elections. *Terry v. Adams,* 345 U.S. 461 (1953); *Smith v. Allwright,* 321 U.S. 649 (1944); *United States v. Classic,* 313 U.S. 299 (1941); *Nixon v. Condon,* 286 U.S. 73 (1932); *Nixon v. Herndon,* 273 U.S. 536 (1927); *Newberry v. United States,* 256 U.S. 232 (1921).

The *Reapportionment Cases* similarly imposed the one man—one vote standard on elections of legislative representatives and other governmental officials. *Baker v. Carr,* 369 U.S. 186 (1962); *Mahan v. Howell,* 410 U.S. 315 (1973); *Kirkpatrick v. Preisler,* 394 U.S. 526 (1969); *Reynolds v. Sims,* 377 U.S. 533 (1964); *Wesberry v. Sanders,* 376 U.S. 1 (1964); *Abate v. Mundt,* 403 U.S. 182 (1971); *Hadley v. Junior College District,* 397 U.S. 50 (1970); *Avery v. Midland County,* 390 U.S. 474 (1968).

The *Ballot Access Cases* were only concerned with the ability of candidates for public office to be placed on the ballot. *Williams v. Rhodes,* 393 U.S. 23 (1968); *Moore v. Ogilvie,* 394 U.S. 814 (1969); *Bullock v. Carter,* 405 U.S. 134 (1972).

On the other hand *Irish v. Democratic-Farmer-Labor Party of Minnesota,* 399 F.2d 119 (8th Cir. 1968), rejected the contention that the State convention which selected delegates to the national convention must be apportioned on the basis of one man, one vote. It held that the requirements of the Equal Protection Clause were satisfied since all party members were entitled to participate equally at the precinct caucuses. *Accord, Smith v. State Exec. Comm. of Dem. Party of Ga.,* 288 F. Supp. 371 (N.D. Ga. 1968).

It has also been held that where delegates to the national convention are chosen at state conventions (rather than by primary elections) the delegates to the state conventions must be appor-

RSCCC contends that the principles of the Equal Protection Clause are not offended by the winner-take-all rule in presidential primary elections, and that it is manifestly inappropriate to extend those principles into the intra-party process of selecting a political party's Presidential and Vice Presidential candidates.

Appellant does not contend that the principle of one man-one vote established by *Baker v. Carr,* 369 U.S. 186 (1962), is violated by the winner-take-all rule. Indeed, no such contention is possible, because the election is conducted on a statewide basis, each eligible Republican voter being entitled to an equally weighted vote. Rather, appellant contends that the winner-take-all rule contains a built-in bias which dilutes and cancels the voting strength of discernible voting elements.

The thrust of appellant's argument is that the winner-take-all rule is inherently unfair because voters for non-plurality candidates are not represented at the Republican National Convention, particularly at the time when Presidential and Vice Presidential candidates are nominated. He contends that the Equal Protection Clause requires that non-plurality factions must have the possibility of obtaining delegate representation, and suggests that this can be best accomplished by the election of delegates from districts within the State.

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tioned among geographic units within the state. *Seergy v. Kings County Republican County Committee,* 459 F. 2d 308 (2d Cir. 1972); *Redfern v. Delaware Republican State Committee,* 362 F. Supp. 65 (D. Del. 1973); *Doty v. Montana State Central Committee,* 337 F. Supp. 49 (D. Mont. 1971); *Maxey v. Washington State Central Committee,* 319 F. Supp. 673 (W.D. Wash. 1970). The common denominator among these cases is that the courts required proportionate representation at the *state convention*—*i.e.,* the first tier at which state delegates to the national convention were selected. None of those decisions required that delegates to the national convention represent the various and diverse interest present at the state convention.

The substance of appellant's arguments is not novel. He belabors at length the real or alleged shortcomings of the winner-take-all rule which have been carefully considered by this Court on several recent occasions in a series of decisions regarding multi-member legislative districts. Although this Court has expressed a judicial preference for single-member districts in court ordered reapportionment plans on the basis of its supervisory powers, *Chapman v. Meier,* 420 U.S. 1 (1975), it has consistently held that the winner-take-all rule is not *per se* unconstitutional. Rather, the challenger bears the burden of establishing that the scheme "was designed to or would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Burns v. Richardson,* 384 U.S. 73, 89 (1966). *Accord, Chapman v. Meier,* 420 U.S. 1, 17 (1975); *White v. Regester,* 412 U.S. 755, 765 (1973); *Whitcomb v. Chavis,* 403 U.S. 124, 144 (1971); *Kilgarlin v. Hill,* 386 U.S. 120 (1967); *Forston v. Dorsey,* 379 U.S. 433, 439 (1965).

The District Court found that "plaintiff has failed to demonstrate factually that any identifiable group has been denied, because of racial or political differences, an opportunity to participate in the Republican primary and to elect delegates of its choice". Appellant contends that the District Court's decision was contrary to this Court's teachings in *Whitcomb v. Chavis,* 403 U.S. 124 (1971). Nevertheless, in his arguments before the District Court, and again in his Jurisdictional Statement, appellant has failed, and is apparently unable, to fulfill the two criteria which are necessary for a successful attack. First, he has completely failed to specify the characteristics which serve to identify the "discernible voting elements" which are allegedly discriminated against. Nor does he assert that he is a member of any identifiable minority, or that he has anything in

common with any recognizable group of voters. Indeed, in his declaration submitted to the District Court, appellant stated that "in light of the fact that in California delegates were awarded only to the candidate winning the primary campaign, I chose not to cast my ballot and did not vote in the [1972] primary election at all." Nor is there any evidence that appellant voted, or was eligible to vote, in any other primary elections.

Secondly, appellant has failed to show that the winner-take-all rule was "conceived or operated as [a] purposeful device to further racial or economic discrimination." *Whitcomb v. Chavis, supra,* at 149. In *Whitcomb* this Court rejected the motion "that any group with distinctive interests must be represented in [the final decision-making forum] if it is numerous enough to command at least one seat". 403 U.S. at 156. In response to arguments strikingly similar to those of appellant, this Court stated,

> The failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of the ghetto residents may have been cancelled out as the District Court held, but this is a *mere euphemism for political defeat at the polls* . . .[W]e have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called 'safe' districts where the same party wins year after year. *Id.* at 153.*

These principles were recently reaffirmed in *Chapman v. Meier,* 420 U.S. 1 (1975), where this Court said "there must be more evidence than a simple disproportionality between the voting potential and the legislative seats won by a racial or political group. *There must be evidence that the group has been denied access to the political process equal to the access of other groups." Id.* at 17.

*Emphasis supplied throughout, unless otherwise noted.

By way of contrast, *White v. Regester,* 412 U.S. 755 (1973), affirmed the decision of the District Court which held under the facts in that case that a legislative reapportionment scheme which provided for multi-member districts in two counties invidiously discriminated against cognizable racial or ethnic groups, and therefore violated the Equal Protection Clause. However, this Court reiterated that,

> *It is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential.* The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less *opportunity* than did other residents in the district to *participate* in the political processes and to elect legislators of their choice. *Id.* at 765-66.

The District Court reviewed the history of racial discrimination in Texas, its relationship with the effects of multi-member districting and concluded that " 'the black community has been effectively excluded from participation in the Democratic primary selection process,' and was therefore generally not permitted to enter the political process in a reliable and meaningful manner." *Id.* at 767. The District Court also found that "the multi-member district, as designed and operated in Bexar County, invidiously excluded Mexican-American from effective participation in political life, specifically in the election of representatives to the Texas House of Representatives." *Id.* at 769.

The factors supporting the decision in *White v. Register* are totally lacking in the instant case. There is no claim of racial discrimination, nor discrimination against any other cognizable group. Furthermore, there is no evidence that the winner-take-all rule contains any built-in biases or was conceived or operated to perpetuate any discrimination.

Although appellant stresses that the primary election in California is state-wide and that a victory in that election may increase a candidate's power at the National Convention, this Court, nevertheless, has made it clear that the elements of proof remain the same regardless of the size of the constituency. *Chapman v. Meier, supra* at 17.

From the foregoing, it is clear that minority elements of an electorate must be given an equal opportunity to participate in the election of their representatives. But the Equal Protection Clause does not require that "distinctive substantive-law interests" of such minority groups be proportionately represented in legislatures, much less that all of the various, divergent and fluid political factions which form within the Republican Party during primary election campaigns be proportionately represented at its National Convention.

Appellant's contentions to the contrary notwithstanding, the similarity between multi-member districting and the winner-take-all primary is quite striking. At the voter level, the first tier of the process, all voters have an equal opportunity to vote, their votes are weighed equally in determining the outcome of the election, and the winning candidates are vested with all of the allocated political power of the constituency. At the second level, whether the legislature or a national convention, the elected representatives have the right to cast their votes consistent with the wishes of the electorate which chose them for office. The fact that certain minority factions may be unrepresented at the second level is not because of a violation of the Equal Protection Clause, but because of political defeat at the polls.

In addition to the reapportionment cases just discussed, this Court has had occasion to consider the constitutionality of the winner-take-all rule in the context of the Electoral College. In *Williams v. Virginia State Board of Elections,*

288 F. Supp. 622 (E.D. Va. 1968) *aff'd mem.*, 393 U.S. 320 (1969), the plaintiffs attacked the constitutionality of Virginia's winner-take-all rule in Presidential elections which provided for a state-wide election and for the successful Presidential candidate to be entitled to all of the State's electors. As in the present case, plaintiffs complained that Virginia's state-wide winner-take-all rule was unfair because it did not afford minority representation among the electors. The District Court rejected the plaintiffs' claims and upheld the constitutionality of the statute.

In facts in *Williams* are strikingly parallel to those of the present case. At the first voting tier all eligible voters cast votes of equal weight, the successful candidate was entitled to all of the state's electors, and those electors were committed to a given candidate. It was not until the second voting tier, *i.e.*, the Electoral College, that the minority voters were unrepresented.

Although appellant would have this Court read *Williams* as resting solely on a construction of Article II, Section 1, and the Twelfth Amendment to the Constitution, such is not the case. On the contrary, the District Court stated: "the authorization of each State by Article II to 'appoint, in such manner as the Legislature thereof may direct' is 'subject to possible constitutional limitations.'" 288 F. Supp. at 626. Thereafter, it analyzed the case on the basis of the Equal Protection Clause and the one person-one vote rule and stated:

> In the selection of electors the [winner-take-all] rule does not in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote. Admittedly, once the electoral slate is chosen, it speaks only for the element with the largest number of votes. This in a sense is discrimination against the minority voters, but in a democratic society the majority must rule, unless the discrimination is invidious. No such

> evil has been made manifest here. Every citizen is offered equal suffrage and no deprivation of the suffrage is suffered by anyone. 288 F.Supp. at 627.

If the District Court, or this Court, had concluded that the winner-take-all rule was contrary to the Equal Protection Clause, nothing in Article II, Section 1, would have prevented the imposition of the districting remedy. The District Court considered arguments of vote dilution and cancellation that were virtually identical with those made in this case and held that the winner-take-all method of election was consistent with the dictates of the Equal Protection Clause.

Appellant places great reliance upon the decision in *Gray v. Sanders,* 372 U.S. 368 (1972), in which this Court held unconstitutional Georgia's county unit system of counting votes in state-wide primary elections for United States Senator and state-wide offices because that system resulted in weighing the rural vote more heavily than the urban vote and weighed some rural counties heavier than other larger rural counties. This Court stated: "once the geographic unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote . . ." *Id.* at 379. Thus, the evil struck down in that case was the disproportionate weighing of votes as a result of geographic factors, an issue not presented in the present case. It should also be noted that in *Gray* this Court specifically left open the question of whether the Equal Protection Clause governs conventions used for nominating candidates in lieu of the primary election system. *Id.* at 378, n. 10. This Court did observe, however, "the only weighing of votes sanctioned by the Constitution concerns *matters of representation,* such as the allocation of Senators irrespective of population and the use of the Electoral College in the choice of a President." *Id.* at 380.

From the foregoing discussion, the principle clearly emerges that nothing in the Constitution requires that all minority interests be proportionately represented at all government levels. Just as electors to the Electoral College and legislators may be elected on a winner-take-all basis, so also may the Republican voters of California choose their delegates to the National Convention. Since appellant has failed to demonstrate that the winner-take-all rule contains a built-in bias which discriminates against any identifiable groups, this motion should be granted and the decision of the District Court affirmed.

II. This Court Has Increasingly Recognized the Impropriety of Further Judicial Intrusions into Intra-Party Affairs.

By this action appellant seeks to induce this Court to extend the one man-one vote principles of the Equal Protection Clause beyond the elective stage and into the representative stage of the essentially political and deliberative process of selecting a political party's Presidential and Vice Presidential candidates.

Shortly stated, appellant invites this Court to inject itself into internal affairs of the Republican Party—namely the manner in which the political power of the State of California must be exercised at the Republican National Convention. On the other hand, appellee RSCCC contends that this case is singularly appropriate for exercise of judicial restraint following the example set in several recent decisions of this Court and lower federal courts. As will be developed below, judicial restraint has been manifested in related cases by the refusal of the courts to attempt to superimpose the principles of the Equal Protection Clause on the inner workings of political parties.

The most recent such example is *Cousins v. Wigoda,* 419 U.S. 477 (1975), which involved the competing claims of two delegations from Chicago to be seated at the 1972 Dem-

ocra[illegible] National Convention. The Wigoda delegates had been elected at the March 1972 Illinois primary election consistent with applicable state law; the Cousins delegates had been chosen at private caucuses held in Chicago after having been previously defeated at the primary. At the convention, the Cousins delegates successfully challenged the seating of the Wigoda delegates on the ground, among others, that the slate-making procedures under which the Wigoda delegates were selected violated the Democratic Party rules. Thereafter, the Cousins delegates were seated and fully participated in the Convention.

This Court was confronted with a conflict between the Illinois election laws and the Democratic Party's rules, and held that the Party's rules prevailed over contrary state law. Thus, it held that the Cousins delegates, which had been selected at private caucuses rather than by popular election, had been properly seated. This ruling was an exercise of judicial restraint on several levels. First, it established that national party rules regarding the qualifications of delegates are not subject to being overturned by inconsistent state laws. Second, it ratified the decisions of the convention which seated the Cousins delegates, thereby avoiding questions as to the validity of the convention decisions in which the Cousins delegates participated. Third, and of particular significance to this case, it held that the cor[illegible]ention acted properly in rejecting the delegates who had been popularly elected and by seating those who had been chosen at private caucuses.

Although this Court expressly disclaimed any view on the issue of "whether national political parties are subject to the principles of the reapportionment decisions, or other constitutional restraints in their methods of delegate selection and allocation", *Id.* at 484, n. 4(2), that decision certainly bears on such questions inasmuch as this Court

approved the action of the convention in seating the Cousins delegates. This Court's ruling virtually rejected any notion that national convention delegates must be chosen on the basis of one man-one vote, much less that the delegates must proportionately represent the various political factions of their constituencies. Indeed, the effect of this Court's holding is to the contrary—convention delegates may be selected without a popular vote if chosen consistent with the Party's rules.

Thus, in *Cousins,* this Court held that the First Amendment's guarantee of freedom of political association elevated the Democratic Party's rules regarding the qualifications of delegates to a stature superior to that of inconsistent state law. *A fortiori,* when state law is consistent with a national party's rules, the validity of the state law should receive the same protection. In the present case, California's winner-take-all rule is consistent with the Republican Party's rules and both should thus partake of First Amendment protection.

Cousins v. Wigoda was the sequel to this Court's earlier decision in *O'Brien v. Brown,* 409 U.S. 1 (1972), which involved the same basic dispute, and in which this Court stressed the desirability of judicial restraint. In *O'Brien,* and the companion case of *Keane v. National Democratic Party,* convention delegates from California and Illinois challenged the actions of the 1972 Democratic Convention's Credentials Committee which had recommended that plaintiffs be unseated. The District Court dismissed the complaints, but the Court of Appeals reversed, granting relief to the California delegates and denying relief to the Illinois delegates, 469 F.2d 563 (D.C. Cir. 1972). On review, this Court granted stays of the judgments of the Court of Appeals principally on the ground that the case was not appropriate for judicial intervention. This Court noted:

No case is cited to us in which any federal court has undertaken to interject itself into the deliberative processes of a national political convention; no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do *relationships of great delicacy that are essentially political in nature. Judicial intervention in this area traditionally has been approached with great caution and restraint.* See *Irish v. Democratic-Farmer-Labor Party of Minnesota,* 399 F.2d 119 (8th Cir. 1968); *Lynch v. Torquato,* 343 F.2d 370 (3d Cir. 1965); *Smith v. State Exec. Comm. of Dem. Party of Ga.* 288 F.Supp. 371 (N.D. Ga. 1968). It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. 409 U.S. at 4.

It should not be overlooked that the challenge to the California delegation in *O'Brien* was based on California's winner-take-all primary election law applicable to the Democratic Party (since altered), the challengers arguing that the winner-take-all rule violated that party's rules. Neither the Court of Appeals nor this Court addressed the constitutional issue involved, although it appears that the challengers argued that a state's delegation should be distributed in proportion to the votes received by the candidates they represent. Nevertheless, the effect of this Court's action was to leave the decision to the convention.[3]

---

3. *O'Brien* was finally dismissed a moot, 409 U.S. 816 (1972), and its companion case, *Keane v. National Democratic Party,* was remanded to the Court of Appeals, 409 U.S. 816 (1972), where it was dismissed. 475 F.2d 1287 (1973).

The most recent example of judicial restraint is found in the decision of *Ripon Society v. National Republican* Party, ... F.2d ...., 44 U.S.L.W. 2161 (D.C. Cir. 1975). The plaintiffs attacked the constitutionality of the Republican Party's method of allocating delegates among the States, alleging that the formula violated the one man-vote standard of the Equal Protection Clause because it did not allocate delegates in proportion to the States' populations. The Court of Appeals rejected the notion that the Equal Protection Clause is applicable to such internal affairs of the Republican Party, stating that:

> "[n]ational conventions have never been conceived as having the function of providing a strict one person-one vote representation to a definable national constituency . . . . Moreover, the interests advanced by adopting representation schemes of the party's own choosing seen to be of great importance and of clearly constitutional stature." *Id.* at 2162.

The primary basis upon which the Court of Appeals rested its decision was the First Amendment's guarantee of free political association. In this regard, the court stated:

> What is important is that a party's choice of the one way of governing itself that seems best calculated to strengthen the party and advance its interests deserves the protection of the constitution as much, if not more, than its condemnation. The constitutional rights of speech and assembly are of slight value if they do not carry with them a comitant (sic) right of political association . . . there must be a right not only to form political associations but to organize and direct them in the way that will make them most effective.
>
> . . . Therefore, the Equal Protection Clause, assuming it is applicable, does not require a representation in presidential nominating conventions of some defined constituency on a one person-one vote basis. *Id.* at 2162.

It is evident from a review of this decision that the central issue concerned the manner in which the political power of the Republican Party may be allocated and exercised. Although the Court of Appeals for the District of Columbia had earlier demonstrated no reluctance to become involved in such matters (e.g., *O'Brien v. Brown,* 469 F.2d 563 (D.C. Cir. 1972), *stay granted,* 409 U.S. 1 (1972), *Georgia v. National Democratic Party,* 447 F.2d 1271 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 858 (1972) and *Bode v. National Democratic Party,* 452 F.2d 1302 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 1019 (1972)), its decision in *Ripon* apparently signaled its acknowledgment and understanding of this Court's contrary inclinations as exhibited in *O'Brien* and *Cousins.* As the Court of Appeals stated in *Ripon,* "it is the essence of the First Amendment rights that the parties exercise that they make their own contrary (and rational) judgments without interference from the courts." *Id.* at 2162-63.

The perception of the Court of Appeals in *Ripon* is surely correct. The approval of the *Smith, Irish* and *Lynch* cases in this Court's opinion in *O'Brien* and the later decision in *Cousins* clearly demonstrate this Court's conviction that judicial intrusions into intra-party affairs should not go beyond assuring both equal voter participation and full voter protection at the grass roots level of the delegate selection process. The reason for such restraint is clear: judicial intervention may have a significant impact on the delicate balance of power between competing party factions and could produce substantial and unanticipated changes in the operation of the political system itself. Considering these potential effects, the courts lack judicially manageable standards for dealing with such questions. *See, e.g.,* Note: *One Man, One Vote and the Selection of Delegates to National Nominating Conventions,* 37 U. Chi. L. Rev. 536, 547 (1970).

III. The Winner-Take-All Primary Election Rationally Advances Legitimate State Interests.

Appellant contends that the District Court erred by failing to test the winner-take-all rule by a standard of strict review. The District Court reached this conclusion on the basis that appellant had not demonstrated that the winner-take-all rule operates to discriminate against any identifiable political group (fn. 30). In his Jurisdictional Statement, appellant contends that proof of such discrimination is not a necessary predicate to employing the strict standard of judicial review, relying on this Court's decisions in *Bullock v. Carter,* 405 U.S. 134 (1972); *Hill v. Stone,* 421 U.S. 289 (1975); *Kusper v. Pontikes,* 414 U.S. 51 (1973); and *Storer v. Brown,* 415 U.S. 724 (1974) Although it is true that the challengers in those cases were not required to identify specific political groups in order to sustain their challenges, each of those cases involved various restrictions on the exercise of the right of suffrage, matters which are not in issue in this case. *Hill* and *Kusper,* respectively, involved rules which disenfranchised those who did not own real property and those who desired to change their party affiliations. *Storer* and *Bullock* involved restrictions which prevented candidates from being placed on the ballot. These cases are inapposite simply because the present case does not involve any infringements on the exercise of the right to vote. The issues, as presented by appellant, involve solely the results of elections.

Considering that appellant has failed to demonstrate that the winner-take-all rule infringes upon the protections of the Equal Protection Clause, it is evident that the statute in question must be judged by the so-called "rational relationship" test rather than the "compelling state interest" test.

The applicable standard of judicial scrutiny is found in the decision of *McDonald v. Board of Election Commis-*

sioners of Chicago, 394 U.S. 802 (1969), where this Court held that an Illinois statute which denied unsentenced prisoners the right to vote by absentee ballot did not violate the Equal Protection Clause in the absence of evidence that they were absolutely prohibited from voting. Clearly the statute in question severely hampered the unsentenced prisoners in the exercise of their right to vote. Nevertheless, this Court rejected the applicability of the "compelling state interest" test, saying that

> Such an exacting approach is not necessary here, however, for two readily apparent reasons. First, the distinctions made by Illinois' absentee provisions are not drawn on the basis of *wealth* or *race*. Secondly, there is nothing in the record to indicate that the Illinois statutory scheme had an impact on appelants' *ability to exercise the fundamental right to vote*. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. 394 U.S. at 807.

The rationale of *McDonald* is applicable to the present case. Appellant does not contend that the winner-take-all primary discriminates on the basis of wealth, race, geography or other "invidiously discriminatory" factors. Rather, his complaint is that it prevents proportionate representation of divergent philosophies at the national convention. It follows from *McDonald* that in a case such as the present where the challenged statute does not create "constitutionally suspect" classifications, and does not even hamper the citizen's exercise of the right to vote as did the Illinois law, the "rational relationship" test is the appropriate standard, and appellant must establish by competent evidence that the statute in question is totally unrelated to the pursuit of a legitimate state end.

In *McDonald* the "rational relationship" was defined as follows:

> . . . [The] statute must bear some *rational relationship* to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons *totally unrelated to the pursuit of that goal.* Legislatures are *presumed* to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if *no grounds can be conceived of to justify them.* 394 U.S. at 809.

In evaluating the constitutionality of the winner-take-all primary election rule, the court must "consider all the facts and circumstances behind the law, the interest which the state claims to be protecting, and the interest of those who are disadvantaged by the classification." *Williams v. Rhodes,* 393 U.S. 23, 30 (1968). *Accord, Dunn v. Blumstein,* 405 U.S. 330, 335 (1972); *Storer v. Brown,* 415 U.S. 724, 730 (1973).

In a series of recent decisions, this Court has approved the legitimacy of the following state interests as a basis for regulating elections. The state has a "substantial State interest in encouraging compromise and political stability, in attempting to ensure that the election winner will represent a majority of the community and in providing the electorate with an understandable ballot . . . ". *Storer v. Brown, supra* at 729; *Williams v. Rhodes,* 393 U.S. 23, 32 (1968). The state has a *compelling* interest in maintaining the stability of its political system which is intimately dependent upon preserving the integrity of its political parties. *See Storer v. Brown,* supra at 736. *Accord, Rosario v. Rockefeller,* 410 U.S. 752 (1973); *Kusper v. Pontikes,* 414 U.S. 51 (1973).

In *Storer* this Court agreed with the State of California's concern that "splintered parties and unrestrained factionalism may do significant damage to the fabric of government."

415 U.S. at 736. It has further recognized that a state has a "legitimate interest in regulating the number of candidates on the ballot" and may properly seek "to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a substantial plurality, of those voting . . . ". Moreover, a state has an interest if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidates. *Bullock v. Carter,* 405 U.S. 134, 145 (1972). *Accord, Storer v. Brown, supra* at 732; *Williams v. Rhodes, supra,* at 32; *Jenness v. Fortson,* 403 U.S. 431, 442 (1971).

Subsequently, in *American Party of Texas v. White,* 415 U.S. 767 (1974), this Court deemed the state's interest in preserving the integrity of the electoral process and regulating the number of candidates on the ballot to avoid voter confusion a *compelling* state interest. *Id.* at 782, n. 14. Finally, it has held that the state has a legitimate interest in preserving the integrity of the nominating process of party primary election. *American Party of Texas v. White, supra* at 786.

It is clear that the statute in question in the instant case advances the foregoing state interests and is rationally related to the pursuit of those goals. The winner-take-all primary is designed to assure that California's delegation to the Republican National Convention represents the views of the majority, or at least a substantial plurality, of those voting. By permitting a unified delegation, California fosters unity in the state's Republican Party. Voting as a bloc, the California Republican delegation may more successfully influence the national convention to nominate a Presidential candidate and adopt programs as part of the Party's campaign platform that will meet with the approval not only of California Republicans, but California voters generally.

In short, the winner-take-all rule advances several significant and compelling state interests and is rationally related to the achievement of a legitimate state end. Certainly it cannot be said that the statute in question is "based on reasons totally unrelated to the pursuit of that goal" or that the statutory scheme should be set aside because "no grounds can be conceived to justify them." *McDonald v. Board of Election Commissioners of Chicago, supra* at 809.

IV. Conclusion.

From the foregoing it is clear that the one man-one vote principle of the Equal Protection Clause and the First Amendment's guarantee of freedom of political association do not require that state delegates to national political conventions must be apportioned among the various Presidential candidates participating in the primary election. In complete conformance with the theories underlying our representative form of government, national convention delegates are *representatives* of the state's political party at the convention, and there is no Constitutional mandate that the various philosophical factions of given constituencies be afforded proportionate representation. The Constitution simply demands that all eligible voters be equally entitled to participate in the process whereby representatives are chosen. Thus, just as a state's representatives in the Electoral College or the members of a multi-member legislative district may be elected on a winner-take-all basis, so also may a state's delegates to a national political convention be chosen.

A rule to the contrary, imposing the one man-one vote principle, would have serious ramifications far beyond the instant case. If a state's allocated number of convention delegates must be apportioned among all contenders in the primary election, the obvious and necessary result is a Constitutional mandate that every state hold a Presidential

primary election for each political party. According to appellant's own law review article, only twenty-three jurisdictions held Presidential primaries in 1972, and among them there were at least four general types of systems. Note: *One Person-One Vote: The Presidential Primaries and Other National Convention Delegate Selection Processes,* 24 Hastings L. Rev. 257, 274 (1973). If convention delegates must be apportioned among the Presidential candidates on the basis of election results not only must each of these twenty-four jurisdictions conform their election systems, but the remaining jurisdictions must also hold Presidential primary elections. Clearly a rule of such constitutional magnitude cannot apply to the State of California alone.

The impact on the states as well as Presidential candidates would be enormous. At least one major factor pertinent to a state's decision not to hold a Presidential primary is the substantial cost involved. From the candidate's viewpoint, he has neither the time nor the funds to actively compete in primary elections in each jurisdiction. What could be more discouraging to potential candidates that the necessity of spending the time and investing the resources necessary to compete in primary elections throughout the nation? Indeed, only those few candidates with overwhelming resources could ever participate in, much less survive, the primary process demanded by appellant. Surely the Constitution does not impose such unreasonable demands.

For the foregoing reasons, appellee RSCCC urges that its motion to affirm be granted and the decision of the District Court affirmed.

Dated: December 19, 1975

Respectfully submitted,

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(Appendix Follows)

Appendix

Assembly Bill No. 427

CHAPTER 1048

An act to repeal and add Chapter 1 (commencing with Section 6000) of Division 5 of the Elections Code, relating to the presidential primary.

[Approved by Governor September 24, 1975. Filed with Secretary of State September 24, 1975.]

The people of the State of California do enact as follows:

SECTION 1. Chapter 1 (commencing with Section 6000) of Division 5 of the Elections Code is repealed.

SEC. 2. Chapter 1 (commencing with Section 6000) is added to Division 5 of the Elections Code, to read:

CHAPTER 1. PRESIDENTIAL PRIMARY

Article 1. General Provisions

6000. The provisions of this chapter shall be applicable only to the presidential primary ballot of the Republican Party, and qualified parties for which no other provisions apply.

6001. The provisions of this code relating to the direct primary apply to the presidential primary insofar as the former do not conflict with the latter.

Article 2. Number and Certification of Delegates

6005. The chairman of the state central committee shall notify the Secretary of State on or before the first day of February immediately preceding the presidential primary as to the number of delegates to represent the state in the next national convention of his party.

6006. The notification of the number of delegates shall be in substantially the following form:

STATEMENT OF NUMBER OF DELEGATES TO THE REPUBLICAN PARTY NATIONAL CONVENTION

To the Secretary of State
Sacramento, California

You are hereby notified that the number of delegates to represent the State of California in the next national convention of the Republican Party is .....

Dated this ..... day of ....., 19.....

.....

Chairman of the State Central Committee
of the Republican Party.

6007. If the chairman of the state central committee fails to file a notice as to the number of delegates, the Secretary of State shall ascertain the number from the call for the national convention issued by the national committee of the party.

6008. The Secretary of State shall, on or before the 10th day of February of the year of the presidential primary, certify to the county clerk of each county the number of delegates to be elected by the Republican Party.

6009. The certification to the county clerk of the number of delegates shall be in substantially the following form:

CERTIFICATE OF SECRETARY OF STATE AS TO NUMBER OF DELEGATES TO THE REPUBLICAN PARTY NATIONAL CONVENTION

To the County Clerk of ..... County:

I hereby certify to you that the Republican Party is qualified to participate in the presidential primary to be held in this state on the ..... day of ....., 19....., and

the number of delegates to be elected by the Republican Party to represent the State of California in its next national convention is .....

Dated at Sacramento, California, this ..... day of February, 19.....

.....

Secretary of State

(SEAL)

Article 3. Selection of Candidates by the Secretary of State

6010. The Secretary of State shall place the name of a candidate upon the Republican presidential primary ballot when the Secretary of State shall have determined that such a candidate is generally recognized throughout the United States or California as a candidate for the nomination of the Republican Party for President of the United States.

On or before February 1 immediately preceding a presidential primary election the Secretary of State shall publicly announce and distribute to the news media for publication a list of the candidates he intends to place on the ballot at the following presidential primary election. Following this announcement he may add candidates to his selection, but he may not delete any candidate whose name appears on the announced list.

6011. When the Secretary of State decides to place the name of a candidate on the ballot pursuant to Section 6010, he shall notify the candidate that his name will appear on the ballot of this state in the presidential primary election.

The secretary shall also notify the candidate that he may withdraw his name from the ballot by filing with the Secretary of State an affidavit pursuant to Section 6012 no later than the 64th day before the election.

6012. If a selected candidate or a nonselected candidate files with the Secretary of State, no later than the 64th day before the presidential primary, an affidavit stating without qualification that he is not now a candiate for the office of President of the United States at the forthcoming presidential primary election, his name shall be omitted from the list of names certified by the Secretary of State to the county clerks for the ballot and his name shall not appear on the presidential primary ballot.

6013. Any unselected candidate desiring to have his name placed on the presidential primary ballot shall have nomination papers circulated in his behalf. In order to qualify his name for placement on the presidential primary ballot, the candidate's nomination papers shall be signed by voters registered as affiliated with the Republican Party equal in number to not less than 1 percent of the number of persons registered as members of the Republican Party, as reflected in the report of registration issued by the Secretary of State in January of the year of the presidential primary election.

Article 4. Nomination Papers

6021. Nomination papers properly prepared, circulated signed and verified shall be left, for examination, with the county clerk of the county in which they are circulated, at least 74 days prior to the presidential primary.

6024. Each signer of a nomination paper may sign only one paper. He shall declare his intention to support the candidate for nomination, add his place of residence, and give his street and number if any. His election precinct shall also appear on the paper just preceding his name, and he shall write the date of his signature at the end of the line just after his residence.

6025. Any nomination paper may be presented in sections. Each section shall contain the names of the candidate.

Each section shall bear the name of the county in which it is circulated. Only voters of the county registered as intending to affiliate with the political party by which the nominations are to be made are competent to sign.

6026. Each section shall be prepared with the lines for signatures numbered, and shall have attached the affidavit of the verification deputy who obtained signatures to it, stating that all the signatures to the attached section were made in his presence, and that to the best of his knowledge and belief each signature to the section is the genuine signature of the person whose name it purports to be. No other affidavit is required. The affidavit of any verification deputy shall be verified free of charge by any officer authorized to administer oaths.

6027. A verified nomination paper is prima facie evidence that the signatures are genuine and that the persons signing it are voters, until it is otherwise proved by comparison of the signatures with the affidavits of registration in the office of the county clerk.

6028. The nomination paper for a candidate shall be in substantially the following form:

SECTION OF NOMINATION PAPER SIGNED BY VOTER ON BEHALF OF CANDIDATE

Section ..... Page .....

County of ..... Nomination paper for ..... as presidential nominee of the Republican Party.

State of California }
County of ..... } ss.

Signer's Statement

I, the undersigned, am a voter of the County of ....., State of California, and am registered as intending to affi-

liate with the Republican Party. I have not signed the nomination paper of any other candidates for the same office, and further declare that I intend to support the nomination of the candidate named herein at the Republican Party presidential primary to be held on the ..... day of ....., 19.....

Number	Precinct	Signature	Residence	Date
1				
2				
3				
etc.				

Verification Deputy's Affidavit

I, ..., solemnly swear (or affirm) that I have been appointed as a verification deputy to secure signatures in the County of ..... to the nomination paper of the candidate named in the signer's statement above as candidate for nomination by the Republican Party at its presidential primary election; that all the signatures on this section of the nomination paper numbered from 1 to ....., inclusive, were made in my presence, and that to the best of my knowledge and belief each signature is the genuine signature of the person whose name it purports to be.

(Signed) .....
Verification Deputy

Subscribed and sworn to before me this ..... day of ...., 19.....

.....
Notary Public (or other official)

Article 5. Verification Deputies

6030. The candidate or his designee may arrange for the appointment of verification deputies to serve within the county in which the deputies reside in securing signatures to the nomination paper of the candidate. The verification deputies thus appointed are the duly authorized verification deputies to secure signatures to the nomination paper of the candidate in that county. The form on which the verification deputies are appointed shall be filed with the county clerk of the county in which the verification deputies reside, at or before the time the nomination paper of the candidate is left with the county clerk for examination. Additional verification deputies may be appointed in the same manner as the original verification deputies were appointed.

6031. The verification deputies may be appointed by the candidate or his designee on a form which shall be substantially as follows:

APPOINTMENT OF VERIFICATION DEPUTIES BY CANDIDATE OR HIS DESIGNEE

I, the undersigned candidate or designee, do hereby appoint the following voters of the County of ..... as verification deputies to obtain signatures, in that county, to nomination papers for ..... as a candidate in the Republican Party presidential primary, to be held the ..... day of ....., 19.....

Verification Deputies

Name	Residence
.....	.....
.....	.....
.....	.....
etc.	etc.

Candidate or His Designee

(Signed)

Name Residence

....

Filed in the office of the County Clerk of .....
County, this ..... day of ....., 19.....

....., County Clerk

By ....., Deputy

6032. Verification deputies may obtain signatures to the nomination paper of a candidate for whom they were appointed, at any time not more than 104 nor less than 74 days prior to the presidential primary.

6033. The verification of signatures to nomination papers shall not be made by a county clerk, a deputy county clerk, or within 100 feet of any election booth, polling place, or any place where registration of electors is being conducted.

Article 6. Arrangement and Examination of Nomination Papers

6040. Each section of a nomination paper, after being verified, shall be returned by the verification deputy who circulated it to the candidate or his designee by whom the verification deputy was appointed. All the sections circulated in any county he shall be collected by the candidate or his designee and he shall arrange and leave the sections with the county clerk for examination.

6041. Prior to filing, the sections of a nomination paper for a candidate shall be numbered in order.

6042. Nomination papers, properly assembled, may be consolidated and fastened together by counties, but nomination papers signed by voters in different counties shall not be thus fastened together.

6043. The county clerk shall examine all nomination papers left with him for examination and shall disregard and mark "not sufficient" the name of any voter of his county which does not appear in the same handwriting on an affidavit of registration in the office of the county clerk. He shall also disregard and mark "not sufficient" the name of any voter of his county who has not stated his intention to affiliate with the Republican Party.

6044. Within five days after any nomination papers are left with him for examination, the county clerk shall:

(a) Examine and affix to them a certificate reciting that he ha examined them and stating the number of names which have not been marked "not sufficient."

(b) Transmit the papers with the certificate of examination to the Secretary of State, who shall file the papers.

6045. The county clerk's certificate to nomination papers of a candidate shall be in substantially the following form:

COUNTY CLERK'S CERTIFICATE TO NOMINATION PAPERS OF A CANDIDATE

To the Secretary of State:

I, County Clerk of the County of ....., hereby certify that I have examined the nomination papers, to which this certificate is attached, of the candidate for the ensuing presidential primary, and that the number of names which I have not marked "not sufficient" is .....

The candidate named in the nomination papers is.....

.....

Dated this ..... day of ....., 19.....

....., County Clerk

By ....., Deputy

6046. No filing fee is required from any person to be voted for at a presidential primary.

Article 7. Certified List of Candidates, Notice of Election

6050. At least 59 days before a presidential primary, the Secretary of State shall transmit to each county clerk a certified list containing the names and addresses of the candidates for whom nomination papers have been filed and who are entitled to be voted for at the presidential primary.

The certified list shall be in substantially the following form:

CERTIFIED LIST OF CANDIDATES
SECRETARY OF STATE

To the County Clerk of .....County:

I, ..., Secretary of State, do hereby certify that the following list contains the name and post office address of each person for whom nomination papers have been filed in my office and who is entitled to be voted for at the presidential primary to be held on the ..... day of ....., 19...., as nominee of the Republican Party.

List of Candidates
Republican Party

Name	Address
1	.....
2	.....
3	.....
etc.	etc.

Dated at Sacramento, California, this ..... day of..... ....., 19.....

.....

(SEAL)

Secretary of State

6051. Immediately after the county clerk receives the certified list of candidates from the Secretary of State, he shall publish it in a presidential primary notice, under the party designation. The notice shall also contain:

(a) The date of the election.

(b) The hours during which the polls will be open.

6052. The publication of the presidential primary notice shall be made in the county pursuant to Section 6061 of the Government Code, and by causing a copy thereof to be posted at the courthouse door and at such other places in the county as are designated by ordinance for the posting of public notices.

The cities or town of residence of the candidates shall be included in the presidential primary notice.

6053. The notice of the list of candidates published by the county clerk shall be in substantially the following form:

NOTICE BY COUNTY CLERK OF TIME AND PLACE OF PRESIDENTIAL PRIMARY ELECTION, POLITICAL PARTIES ENTITLED TO PARTICIPATE THEREIN, AND NAMES AND ADDRESSES OF CANDIDATES

Notice is hereby given that a Republican presidential primary election is to be held in the County of ..... on the ..... day of ....., 19....., and that there is stated the name and address of each person for whom nomination papers have been filed in the office of the Secretary of State and who is entitled to be voted for, at the election, as nominee of that party for President.

List of Candidates
Republican Party

Name	Address
1	.....
2	.....
3	.....
etc.	etc.

Notice is also hereby given that at the presidential primary the polls will be open from the hour of 7 o'clock a.m. to the hour of 8 o'clock p.m. on the day thereof.

Dated this ..... day of ....., 19.....

....., County Clerk

Article 8. Canvas of Returns. Certificate of Election

6055. The Secretary of State shall, not later than the 24th day after the election, compile and file in his office a statement of the canvassed returns filed with him by the county clerks.

The compiled statement shall show for each candidate the total of the votes received and the votes received in each county.

6056. The Secretary of State shall, not later than the 24th day after the election, issue a certificate of election to the candidate who received the largest vote cast of that party, such person thereby being the party's presidential nominee candidate from California.

6057. The Secretary of State shall, not later than the 24th day after the election, issue a certification to delegate to each person selected as a delegate.

Article 9. Write-In Candidates

6060. Notwithstanding any other provisions of law, a space shall be provided on the presidential primary ballot for an elector to write in the name of a candidate for President of the United States.

6061. Any person who believes his name may be used as a write-in candidate for President of the United States shall, not later than 21 days before the primary election, file his endorsement of his write-in candidacy with the Secretary of State, or no votes shall be counted for him.

6062. Any person who receives, by write-in vote, a plurality of the votes cast for President of the United States shall, within 10 days after the primary election, file a list of delegates to the national convention of his political party with the Secretary of State in the manner prescribed in Section 6071.

6063. If the candidate fails to file a list of delegates, the state central committee of the party in whose primary the candidate receive the plurality vote shall, within 10 days of the end of the 10-day period required in Section 6062, file a list of delegates with the Secretary of State. The delegation shall go to the convention unpledged to any candidate.

Article 10. Selection of Delegates

6070. Every candidate whether selected pursuant to Section 6010, or unselected as defined in Section 6013, who wishes to have a delegation of electors pledged to his candidacy in accordance with the result of the presidential preference primary or who wishes to have an official California delegation at the Republican National Convention shall form a delegation in compliance with Section 6071 of this code.

6071. (a) The delegation of each candidate shall be composed as follows:

(1) Seventy-eight percent of the delegation, or the nearest whole number thereto which provides for a total number of district delegates equal to at least three times the number of congressional districts within the state, shall be composed of three delegates selected for each congressional district.

(2) The remainder of the delegation shall be composed of delegates selected at large from throughout the state.

The names of the persons chosen as delegates shall be submitted to the Secertary of State, by the candidate or his designee, no later than 30 days before the presidential primary election for certification.

(b) There shall be no more than one alternate per delegate. Alternates shall be appointed by the candidate or his designee and shall be appointed by congressional districts, the number per congressional district to be no less than three. Such alternates shall be submitted to the Secretary of State within thirty (30) days after the primary for certification.

(c) Each delegate to the Republican National Convention shall use his best efforts at the convention for the party's presidential nominee candidate from California to whom the delegate has pledged support until such person is nominated for the office of President of the United States by such convention, receives less than 10 percent of the votes for nomination by such convention, releases the delegate from his obligation, or until two convention nominating ballots have been taken. Thereafter, each delegate shall be free to vote as he chooses, and no rule may be adopted by a delegation requiring the delegation to vote as a body or causing the vote of any delegate to go uncounted or unreported.

Article 11. Republican Presidential Primary Ballot

6080. The format of the presidential portion of the Republican primary ballot shall be governed by the provisions of Chapter 2 (commencing with Section 10200) of Division 7, with the following exceptions:

(a) Instructions to voters shall exclude any reference to groups of candidates preferring a person whose name appears on the ballot or references to any group of candidates not expressing a preference for a particular candidate.

(b) In place of the heading: "FOR DELEGATES TO NATIONAL CONVENTION. Vote for One Group Only." shall appear the heading: "PRESIDENTIAL PREFERENCE. Vote for One."

(c) Candidates for President shall be listed on the ballot in the same order provided for in Chapter 2 (commencing with Section 10200) of Division 7 for statewide candidates.

(d) Only the names of selected and unselected presidential candidates shall appear on the ballot in the spaces provided. No reference shall be made to their being preferred by candidates for delegates to the national convention.